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OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

REPUBLICAN PARTY OF NORTH CAROLINA; Bruce Briggs; William R. Sigmon; Marvin K. Gray; R. Howard Riddle; Lloyd Fowler; Joe R. Wilson; R. Walter White; Edgar A. Readling, Jr.; Frederic M. Gallagher; Ralph A. Walker,

Plaintiffs-Appellants,

v.

James G. MARTIN, Governor of North Carolina; North Carolina State Board of Elections; Robert N. Hunter, Jr., Chairman of North Carolina State Board of Elections; Thomas A. Farr; William A. Marsh, Jr.; Ruth Turner Semashko; June K. Youngblood; The North Carolina Association of Black Lawyers,

Defendants-Appellees,

and

Durham County Board of Elections; Forsyth County Board of Elections; Guilford County Board of Elections,

Defendants.

No. 91-1741.
United States Court of Appeals, Fourth Circuit.
Argued May 6, 1992.
Decided Nov. 24, 1992.
As Amended Jan. 5, 1993.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

Before RUSSELL and WILKINS, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Western District of Virginia, sitting by designation.

OPINION

WILKINS, Circuit Judge:

The Republican Party of North Carolina (RPNC)[1] appeals an order of the district court dismissing its suit against the North Carolina State Board of Elections (NCSBE)[2] on the ground that RPNC's complaint presents a

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[1] Appellants include the Republican Party of North Carolina, individual North Carolina voters registered as Republicans, individual North Carolina voters registered as Democrats but who regularly vote for Republican candidates for superior court judgeships, former candidates for the office of Superior Court Judge in North Carolina, one current Superior Court Judge, and one former Superior Court Judge. For ease of reference, we refer to Appellants collectively as "RPNC."

[2] Appellees joining the motion made by the North Carolina State Board of Elections include the Chairman of the North Carolina State Board of Elections, Robert N. Hunter, Jr., and various other individuals sued as officials responsible for conducting elections in the state. The North Carolina Association of Black Lawyers, a statewide organization of black lawyers and law students, successfully moved to intervene as a party defendant, *see Republican Party of N.C. v. Martin*, 865 F.2d 1259 (4th Cir. 1988) (per curiam), and joins the motion as well. Defendant James G. Martin, Governor of North Carolina, did not move or join in the motion to dismiss. However, the district court dismissed the complaint against all defendants due to the absence of a justiciable question. *See* Fed. R. Civ. P. 12(h)(3). We refer collectively to Appellees as "NCSBE."

(continued...)

nonjusticiable political question. In its complaint brought under 42 U.S.C.A. §§ 1981, 1983 (West 1981 & Supp. 1992), RPNC alleges that the method of electing superior court judges[3] in North Carolina constitutes a political gerrymander intended to deprive members of the Republican Party and others aligned with this political party of rights guaranteed by the First Amendment, U.S. Const. amend. I, and the Equal Protection Clause of the Fourteenth Amendment, *id.* at amend. XIV, § 1. We agree with RPNC that a justiciable question is presented. We further conclude that the complaint states a claim under the Fourteenth Amendment that, if proven, is one upon which relief may be granted. We find, however, that RPNC has failed to state a claim under the First Amendment. Consequently, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

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[2](...continued)

The original defendants also included several county boards of elections. These defendants successfully moved to dismiss early in the litigation. *Republican Party of N.C. v. Martin*, 682 F. Supp. 834 (M.D.N.C.1988) (also granting motion of remaining defendants for change of venue from the Middle District to the Eastern District of North Carolina).

[3] Superior court judges in North Carolina are trial court judges of general jurisdiction.

I.

A.

Prior to 1868, the General Assembly of North Carolina appointed all state judges. John L. Sanders, *A Brief History of the Constitutions of North Carolina, in The Constitution of the State of North Carolina: Its History and Content* 1, 1-2 (issued by Thad Eure, Secretary of State of North Carolina, 1983). Since 1868, the Constitution of North Carolina has allowed the General Assembly to choose between statewide or districtwide popular elections as the method for selecting superior court judges.[4] *See* N.C. Const. art. IV, § 16 (also noting that current provisions of this section are similar to those of the 1868 constitution as rewritten in 1962). In 1877, the General Assembly implemented the present scheme of statewide elections,[5] *see generally* N.C. Gen. Stat. § 163-1 (Michie 1991) (detailing current timing of primaries and elections), and in 1915, the legislature enacted Chapter 101, a law that includes a requirement that candidates for the office of superior court judge be nominated through party primaries, *see generally id.* § 163-104 (Michie 1991) (current provision addressing primary elections). Although Chapter 101 does not specify

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[4] The General Assembly must "divide the State into a convenient number of Superior Court judicial districts." N.C. Const. art. IV, § 9(1). The constitution further directs the legislature to organize the counties of the state into judicial divisions to encompass multiple judicial districts. *Id.* §§ 9, 11.

[5] RPNC maintains that North Carolina is the only state in which trial judges of general jurisdiction are elected by a statewide, general election.

that the local primaries be held within each district, the North Carolina State Board of Elections implemented and presently maintains a system of local districtwide primaries.[6] Consequently, voters nominate candidates for superior court judgeships in local party primaries held in each district, and thereafter, the successful primary candidates from each district run against each other in a general, statewide election. Thus, for example, in a given district, the voters select one candidate in the Democratic primary and another in the Republican primary. These candidates then run against each other to fill that superior court judgeship in a general, statewide election in which all of the voters of the state participate.

While superior court judges must "reside in the district for which [they are] elected," N.C. Const. art. IV, § 9(1), the constitution grants the judges statewide jurisdiction, *id.* § 12(3), and permits rotation from district to district within a judicial division,[7] *id.* § 11. Presently, the state is divided into four judicial divisions. *See* N.C. Gen. Stat. § 7A-41 (Michie Supp. 1991). According to RPNC's complaint, superior court judges do not actually serve throughout the state because assignment outside of a division rarely occurs, and a superior court judge exercises unique statutory powers within his or her own district. For example, the

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[6] Neither party points to statutory authority for this practice and our research has uncovered no statute directing it.

[7] Amendments to the constitution in 1868 resulted in the rotation requirement. *See* N.C. Const. art. IV, § 11 (noting that provisions of § 11 are similar to those of art. IV, § 9 of the constitution of 1868 as rewritten in 1962).

judge in each district appoints the local public defender, *id.* § 7A-466(d) (Michie Supp. 1991), and fills vacancies for the position of clerk of superior court, *id.* § 7A-100(a) (Michie 1991).

In the mid-1980's, the North Carolina Association of Black Lawyers and others brought suit against Governor Martin alleging that features of the system of electing superior court judges had the purpose and effect of abridging nonwhite voting strength in violation of the Voting Rights Act, 42 U.S.C.A. §§ 1971-74e (West 1981 & Supp. 1992), and the Fourteenth Amendment of the United States Constitution. This litigation ended by a consent decree upon adoption by the General Assembly of Chapter 509 of the North Carolina Session Laws of 1987, 1987 N.C. Sess. Laws 509 (codified at scattered sections in N.C. Gen. Stat. §§ 7A-1, *et seq.*, 163-1, *et seq.* (Michie 1991 & Supp. 1991)) (Chapter 509). *See Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1987).

Chapter 509 eliminated staggered terms within multimember judicial districts and mandated redrawing of district lines.[8] *See State ex rel. Martin v. Preston*, 325 N.C.

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[8] Subsequent to passage of Chapter 509, Governor Martin filed suit in his individual and official capacity against the State Board of Elections and numerous superior court judges claiming that the statute violated the Constitution of North Carolina because it infringed upon the right of voters to elect judges and the right of candidates to seek judicial office. *See Preston*, 385 S.E.2d at 481-82. Governor Martin further maintained that the legislation usurped his executive authority to appoint judges and that the precandidacy residency requirement unconstitutionally denied

(continued...)

438, 385 S.E.2d 473, 476-77 (1989); N.C. Gen. Stat. § 7A-41 (setting forth superior court divisions and districts). As a result, the number of judicial districts increased from 34 to approximately 70.[9] *See Preston*, 385 S.E.2d at 476; N.C. Gen. Stat. § 7A-41 (establishing new district lines). Unlike past configurations, the new district lines often split counties and some districts now consist of parts of more than one county. *See Preston*, 385 S.E.2d at 476; N.C. Gen. Stat. § 7A-41 (explaining new district boundaries). RPNC alleges that 16 districts do not have a courthouse, a clerk of court, or any other official associated with the judicial district except for the local superior court judge. In addition, Chapter 509 set forth the requirement that all individuals seeking nomination for the position of superior court judge must, at the time of filing a notice of candidacy, reside within the district for which they seek election as it will exist at the time the individual would take office. *See Preston*,

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[8](...continued)
otherwise qualified candidates the right to seek office. *See id.* at 482, 486. He did not challenge the practice of districtwide nomination followed by statewide election. The Supreme Court of North Carolina rejected Governor Martin's contentions and held that Chapter 509 comported with the state's constitution. *See id.* at 486. The court also noted that the legislature implemented the statute in order to bring the state into compliance with the Voting Rights Act and to improve the administration of justice. *See id.* at 479.

[9] RPNC contends that Chapter 509 resulted in an increase of the number of judicial districts to 70; NCSBE maintains that it increased the number to 73. This difference has no bearing on the holdings we reach, and for simplicity, we consider the state to include 70 judicial districts.

385 S.E.2d at 477; N.C. Gen. Stat. § 163-106(i) (Michie 1991) (setting forth residency requirement).

According to the allegations of RPNC's complaint, in passing Chapter 509, the General Assembly rejected amendments to eliminate the practice of nomination by primary within each district followed by a statewide general election in favor of a system by which both the primary and general elections would be held within each district. RPNC contends that this defeat marked at least the eighth attempt since 1961 to change the election method.

RPNC maintains that since 1900, in the hundreds of elections for superior court judgeships held in the state, only one Republican has been elected to a superior court judgeship.[10] (This position was eliminated several years later during redistricting.) RPNC further asserts that since 1968, four of the ten Republican candidates for superior court judgeships would have been successful if the general election had been conducted on a districtwide, rather than on a statewide, basis.

RPNC further claims that in the 1984 statewide general election, Republican candidates for superior court judgeships received approximately 46 percent of the overall vote, and Democratic candidates received approximately 54 percent of the overall vote. RPNC's complaint avers that:

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[10] In its complaint, RPNC alleged that no Republicans had been elected to a superior court judgeship since 1900. However, the parties agree that since the filing of the complaint in 1987, one Republican has been elected to the office.

> In the 24th Judicial District however, 54% of the voters who voted for Superior Court judges voted for the Republican candidate for Superior Court judge for that district and 46% voted for the Democratic candidate. Similarly, in what were then the 15A, 17B, 18, 19A, 19B, 21, 22, 23, 24, 25, 26, 27A, 28 and 29 Judicial Districts, a majority of voters who voted for Superior Court judge voted for the Republican candidates. No Republican resident Superior Court judges were elected because of the structural dilution of Republican votes by the voting customs, practices, and procedures complained of herein.

In addition, RPNC maintains that in the 1986 election, a similar disparity between the statewide election results and projected district-wide election results occurred in ten judicial districts.[11]

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[11] RPNC alleges that statewide voting statistics demonstrate that in the 1986 general election, approximately 43 percent of the electorate that voted for superior court judges voted for Republican candidates and 57 percent voted for Democratic candidates. In the Twenty-Sixth Judicial District, however, 52 percent of the district voters who voted for superior court judges voted for the Republican candidates, while 48 percent voted for the Democratic candidates. According to RPNC, a majority of voters in nine other districts voted for the Republican candidates for superior court judgeships. RPNC maintains that had a Republican candidate offered to run in these districts, and had the election been determined on a district-wide basis, Republican candidates would have prevailed in these districts. Party affiliation for 1986 remained constant from 1984: 27 percent of the voters were registered as Republicans, 69 percent as Democrats, and 4 percent were unaffiliated.

B.

RPNC challenges the custom or practice in North Carolina of selecting superior court judges by statewide popular election following local district-wide nomination. According to RPNC, this method of nomination and election contravenes the Fourteenth Amendment by diluting the votes of those who vote for Republican candidates and violates the First Amendment by restricting the rights of Republican voters to free speech and political association. The complaint also contests the validity of the requirement set forth in Chapter 509 that all individuals seeking nomination for the position of superior court judge must, at the time of filing a notice of candidacy, reside within the district for which they seek election. RPNC claims that this provision has the purpose and effect of degrading the influence of Republican voters in violation of the Fourteenth Amendment. RPNC seeks a declaration that the system used to elect superior court judges in North Carolina violates the First and Fourteenth Amendments, an injunction that prohibits NCSBE from conducting elections under the existing scheme, and an order that directs NCSBE to conduct the primary and general elections for superior court judges on a districtwide basis.

NCSBE moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[12] The district court granted the motion, holding that RPNC's

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[12] In addition, NCSBE maintained that the doctrine of legislative immunity barred the suit. The district court did not consider this defense, and NCSBE did not raise it in this appeal. Consequently, the applicability of this doctrine is not before us.

complaint raised a nonjusticiable political question.[13] RPNC appeals from this adverse ruling.

II.

Justiciability concerns "the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so." *Renne v. Geary*, --- U.S. ----, ----, 111 S. Ct. 2331, 2336, 115 L. Ed. 2d 288 (1991). Accordingly, we begin our analysis by addressing whether RPNC presents a nonjusticiable political question in complaining that a political gerrymander of the method for electing superior court judges in North Carolina contravenes the First and Fourteenth Amendments.[14] In concluding that claims of vote debasement in the legislative districting context are justiciable, the Supreme Court set forth the framework for analysis of the political question doctrine in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), articulating six factors that may appear in a case raising a political question:

> Prominent on the surface of any case held to involve a political question is found a [1] textually demonstrable constitutional commit-

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[13] Although the district court purported to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), the court apparently relied primarily on the lack of a justiciable question to reach its holding. Consequently, we view Rules 12(b)(1) and 12(h) as additional authority on which the district court relied for its dismissal.

[14] We review de novo the decision of the district court to grant a dismissal for lack of a justiciable question. *See Ward v. City of Portland*, 857 F.2d 1373, 1374 (9th Cir.1988).

> ment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710. Discovery that any one of these factors is inextricable from a controversy denotes the presence of a political question and renders it nonjusticiable. *Id.*

In *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986), the Supreme Court examined a claim that a state legislative apportionment scheme diluted the votes of Democrats in violation of the Equal Protection Clause of the Fourteenth Amendment. Confronted with the question of the power of the courts to entertain a claim of political gerrymandering, the Court relied on decisions in which it adjudicated claims of racial gerrymandering to conclude that a complaint of vote dilution "by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125, 106 S. Ct. at 2806.

Thus, the Court held that claims of political gerrymandering are justiciable.[15] *Id.* at 143, 106 S. Ct. at 2816.

Like *Bandemer*, this controversy questions whether an electoral scheme implemented by a state legislature violates,

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[15] We are cognizant of the heated debate surrounding the wisdom and reasoning of the *Bandemer* decision. *See generally Bandemer*, 478 U.S. at 144-61, 106 S. Ct. at 2816-25 (O'Connor, J., concurring in judgment) (arguing that practical concerns should render partisan gerrymandering claims nonjusticiable); *Political Gerrymandering and the Courts* (Bernard Grofman ed., 1990) [hereinafter *Political Gerrymandering*] (collecting articles expressing diverse views on *Bandemer*); Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket At Last*, 7 Sup. Ct. Rev. 175, 192 (1986) (*Bandemer* explicitly accepts the implicit holding of *Baker* that claims of political gerrymandering are justiciable.); Charles Backstrom et al., *Partisan Gerrymandering in the Post-Bandemer Era*, 4 Const. Commentary 285, 291 (1987) (arguing that *Bandemer* "establishes an important constitutional right"); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1330 (1987) (insisting that "[j]udicial regulation of partisan gerrymandering would be a cure worse than the disease"); Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. Rev. 1019, 1020 (1991) (reviewing *Political Gerrymandering* and arguing that *Bandemer* has "confounded legislators, practitioners, and academics alike" and that while "[s]ome find the case internally incoherent; others find a method to the madness"). Nonetheless, we remain bound by the decision and apply it here. We are also aware of the argument advanced by NCSBE at oral argument that had *Bandemer* come before the Supreme Court in its present composition, a contrary decision may have resulted. Perhaps, but nevertheless we are constrained to apply the edicts of the Court that we understand now exist. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801). The issue of justiciability of claims of political gerrymandering has been decided, and the Court has recognized that equal protection claims properly may be advanced by political groups.

by diluting votes, the right of a political party to equal protection. Consequently, *Bandemer* controls, in large part, our application of *Baker*. As in *Bandemer*, the issue presented by RPNC is the consistency of state action with the federal constitution, and thus involves no question decided, or to be decided by a branch of government coequal with the federal courts. *See id.* at 123, 106 S. Ct. at 2805-06. This controversy does not present an issue that if addressed by the courts, would cause a foreign or domestic disturbance, would express a lack of respect due to a coordinate branch of government, or would present the potential for embarrassment from multifarious pronouncements by various departments. *See id.* at 122-23, 106 S. Ct. at 2805-06. Further, the issues presented do not raise an unusual need for unquestioning adherence to a political decision already made. *See id.*

NCSBE argues that this case is distinguishable from *Bandemer* and constitutes a nonjusticiable political question because judicially discoverable and manageable standards do not exist to resolve an alleged equal protection violation in the method of electing judges, as opposed to electing legislators. NCSBE correctly points out that in determining that judicially manageable standards existed for resolution of the equal protection issues raised in *Bandemer*, the Court relied on its previous decisions addressing claims of vote dilution and violations of the one-person, one-vote rule brought by racial groups. *See id.* at 123-25, 106 S. Ct. at 2805-06; *see also White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973). The Court concluded that because those decisions and *Bandemer* involved similar questions of fair representation, judicially discoverable and

manageable standards existed for resolution of these issues. *See Bandemer*, 478 U.S. at 124, 106 S. Ct. at 2806. From these conclusions in *Bandemer*, NCSBE reasons that because superior court judges are not representative governmental officials, the issues presented here do not raise questions of fair representation on the part of the elected officials, and thus that the allegations brought by RPNC necessarily involve a nonjusticiable political question. We disagree.

RPNC alleges a claim of vote dilution under the Fourteenth Amendment much like that presented in *Bandemer*. *Baker* directs us to determine the existence of judicially discoverable and manageable standards, *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, and, as *Bandemer* emphasizes, "'[j]udicial standards under the Equal Protection Clause are well developed and familiar,'" *Bandemer*, 478 U.S. at 122, 106 S. Ct. at 2805 (quoting *Baker*, 369 U.S. at 226, 82 S. Ct. at 714-15). The standards for adjudicating constitutional challenges to election schemes for legislators apply equally to challenges to election schemes for superior court judges. Both claims require a court to determine whether a state has unconstitutionally diluted voting strength by implementing and maintaining a defective election scheme. *Cf. id.* at 123-25, 106 S. Ct. at 2805-06; Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg* [hereinafter *Toward a Coherent Theory*], *in Political Gerrymandering* 29, 53-56 (Bernard Grofman ed., 1990) (predicting that the Court will merge racial and political gerrymandering to allow type of proof used in the former to be used in the latter). Consequently, we conclude that the standards governing other types of vote dilution claims provide judicially discernable and manageable

standards for resolution of this case. We decline to hold that standards are discoverable only when the election of legislators is involved.

NCSBE further argues that by adjudicating RPNC's claims, we shall be called upon to make an initial policy determination of a kind clearly for nonjudicial discretion because elected superior court judges are not representative governmental officials. NCSBE, however, fails to identify why the distinction between legislators and popularly-elected judges requires an initial policy determination that lies beyond our competence, nor do we perceive a reason why the distinction requires such a determination. We consider differences between the type of elected officials as pertinent to an adjudication of the merits of the claim, rather than to the justiciability of the case. *Cf. Bandemer*, 478 U.S. at 125, 106 S. Ct. at 2806 (characteristics of complaining group are relevant to merits of case, not to justiciability); *United States Dep't of Commerce v. Montana*, --- U.S. ----, ----, 112 S. Ct. 1415, 1425, 118 L. Ed. 2d 87 (1992) (noting that justiciability focuses on the power of the court to entertain an issue, not on the merits of the case). We conclude, therefore, that RPNC's claims are justiciable.

III.

Because we may affirm a judgment for any reason appearing on the record, *see McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 601*, 964 F.2d 1462, 1467 (4th Cir.1992), we next consider whether RPNC's complaint states a claim upon which relief

may be granted, *see* Fed. R. Civ. P. 12(b)(6).[16] A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). Our inquiry then is limited to whether the allegations constitute "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Bolding v. Holshouser*, 575 F.2d 461, 464 (4th Cir.) (quoting Fed. R. Civ. P. 8(a)(2)), *cert. denied*, 439 U.S. 837, 99 S. Ct. 121, 58 L. Ed. 2d 133 (1978). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). We must assume that the allegations of the complaint are true and construe them in the light most favorable to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404 (1969). Finally, to state a claim of vote dilution brought about by political gerrymandering under these standards, the Supreme Court requires an elevated threshold showing of an actual discriminatory effect. *See Bandemer*, 478 U.S. at 134 & n. 14, 106 S. Ct. at 2811 & n. 14.

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[16] We review a dismissal under Rule 12(b)(6) de novo. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir.1989).

IV.

A.

In a broad sense, "[t]he Equal Protection Clause requires every State to govern impartially." *Karcher v. Daggett*, 462 U.S. 725, 748, 103 S. Ct. 2653, 2668, 77 L. Ed. 2d 133 (1983) (Stevens, J., concurring). The Clause "does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271, 99 S. Ct. 2282, 2292, 60 L. Ed. 2d 870 (1979). Instead, "[i]t simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, --- U.S. ----, ----, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1 (1992). Consequently, to comport with the Equal Protection Clause, classifications must relate to a proper governmental purpose and may not rest upon impermissible criteria. *Cf. id.* (noting that different treatment of newer and older homeowners under state acquisition-value assessment scheme for property taxes does not qualify for heightened review and must only rationally relate to a legitimate state interest); *Feeney*, 442 U.S. at 272, 99 S. Ct. at 2292 (noting that classifications based on race are presumptively invalid). In the context of voting rights, the Clause guarantees the electorate equality of participation in the political process by prohibiting barriers to exercise of the franchise and restrictions on access to the ballot and by ensuring the equality of votes through the forbiddance of vote dilution and unequal weighing of votes. *See* J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945, 958-59 (1975).

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

NCSBE contends that because the goal of equal protection in the context of voting rights is fair and effective representation for all citizens, *see Reynolds v. Sims*, 377 U.S. 533, 565-66, 84 S. Ct. 1362, 1383-84, 12 L. Ed. 2d 506 (1964), the protection afforded by the Equal Protection Clause does not encompass claims of constitutional infirmities surrounding the election of judges since they are not representative governmental officials. NCSBE argues that judges do not act in a politically responsive manner or make decisions in accordance with the views of a constituency. Consequently, this argument concludes, judges cannot be considered representative governmental officials for purposes of an equal protection claim. This interpretation of the Clause, however, misconstrues the interplay between the fundamental protection of the Clause that prohibits classifications not related to a suitable governmental purpose, the goal the state seeks to advance, and the justifications offered by a state for its election scheme. To allege a prima facie equal protection violation, it is enough that a plaintiff complains of governmental treatment dissimilar to that received by others similarly situated. *Cf. Bandemer*, 478 U.S. at 127-34, 106 S. Ct. at 2807-11 (A prima facie case of political gerrymandering requires allegations of intentional discrimination, disproportionate results, and exclusion from the political process as a whole.). In order to rebut a prima facie case, a state must demonstrate adequate justifications that relate to the goal of the classification. *Cf. Reynolds*, 377 U.S. at 565, 84 S. Ct. at 1383 (noting that criteria for differentiation in weighing of votes are insufficient to justify discrimination "unless relevant to the permissible purposes of legislative apportionment"). As a result, questions pertaining to the goals and justifications offered by NCSBE for its

scheme of electing superior court judges are not presently before us because they are not relevant to whether RPNC has stated a claim upon which relief may be granted.

Even if we agreed with NCSBE that the position occupied by an elected official bears on the protection afforded by the Equal Protection Clause, we nevertheless would be compelled to conclude that the election of superior court judges in North Carolina implicates the goal of equal protection and issues of fair and effective representation. In *Chisom v. Roemer*, --- U.S. ----, ----, 111 S. Ct. 2354, 2367, 115 L. Ed. 2d 348 (1991),[17] the Supreme Court responded to the argument that elected judges are immune

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[17] In *Chisom*, the Supreme Court held that the term "representatives" describes the winners of representative, popular elections and that state supreme court judges are representatives for purposes of a claim of vote dilution under § 2 of the Voting Rights Act, 42 U.S.C.A. § 1973 (West Supp. 1992). *Chisom*, 111 S. Ct. at 2368; *see also Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, --- U.S. ----, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991) (Section 2 is applicable to vote dilution claims regarding election of trial judges.); *cf. Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (Preclearance requirements of § 5 of the Act apply to elections of judges.), *aff'd mem.*, 477 U.S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986). The Act forbids imposition of a voting qualification on account of race or color that results in denial or abridgement of the right to vote. *Chisom*, --- U.S. at ----, 111 S. Ct. at 2362. We recognize that the issue presented in *Chisom* was one of statutory interpretation; yet, in addition to reliance on its interpretation of the Act, the Court engaged in a common-sense analysis of how elected judges fit into the scheme of electoral politics. *See id.* at ----, 111 S. Ct. at 2366-67; *see also* Victor J. Franckiewicz, Jr., Case Note, 38 Loy. L. Rev. 211, 222 (1992). Thus, we conclude that the analysis in *Chisom* applies to claims pursued under the Equal Protection Clause.

from public opinion because they are frequently called upon to ignore or defy popular sentiment, explaining that the state "decided to elect its judges and to compel judicial candidates to vie for popular support just as other political candidates do," and thus opted to remove judges from the shelter provided by appointment. The Court concluded:

> If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges . . . .
>
> . . . .
>
> The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office . . . . [I]t seems both reasonable and realistic to characterize the winners as representatives . . . .

Id. at ---- U.S. ----, 111 S. Ct. at 2366-67 (footnotes omitted). Even if judges are not representatives in the sense that they represent the interests of their constituents, the

electorate undoubtedly considers the broad philosophical views of candidates when voting.[18]

NCSBE maintains that *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973), requires a contrary result. In Wells, the district court rejected a claim based on the one-person, one-vote doctrine applied to the election of Louisiana Supreme Court justices, reasoning that "'[j]udges do not represent people, they serve people.'"[19] *Id.* at 455

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[18] Beyond this, there also lies the very real possibility that party affiliation may reflect judicial philosophy and ultimately the outcome of judicial decisions. *See, e.g.*, Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 Am. Pol. Sci. Rev. 843, 847-49 (1961) (suggesting that study results show that "in some cases, judges rely on their personal standards of value in reaching a decision," that "these same personal standards also frequently account for their party affiliation," and that appointed judges may be more likely to vote contrary to their party pattern); Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1128 (1977) (opining that elections render state judges "vulnerable to majoritarian pressure when deciding constitutional cases") (footnote omitted); Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 Yale L.J. 1193, 1206-07 (1989) (arguing that "the amount of pressure felt by a state court judge in rendering a decision will be influenced directly by the method of judicial election utilized" and that "[j]udges elected by partisan election are most susceptible to direct pressure") (footnotes omitted).

[19] We are well aware of the numerous decisions like *Wells*, holding that a judicial office is not a representative one in the context of voting rights challenges. *See, e.g.*, *Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (holding that one-person, one-vote "rule does not apply

(continued...)

(quoting *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S. Ct. 33, 17 L. Ed. 2d 3 (1966)). Vote dilution and one-person, one-vote claims are distinct, and therefore *Wells* does not mandate a dismissal of a claim based on vote dilution.[20] *See Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210-12 (5th Cir.1980) (recognizing distinction between claims grounded in one-person, one-vote and vote dilution in

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[19](...continued)
to the state judiciary"), *aff'd mem.*, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972); *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 626 n. 9 (5th Cir. 1990) (citing cases rejecting challenges to judicial elections on various grounds), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, --- U.S. ----, 111 S. Ct. 2376, 115 L. Ed. 2d 379 (1991); Edward A. Sheridan, Note, *The Equal-Population Principle: Does It Apply to Elected Judges?*, 47 Notre Dame Law. 316, 320-326 (1971) (discussing cases rejecting application of vote debasement principles to judicial elections); Marovitz, *supra* note 18, at 1199 & n. 56 (same).

[20] The Supreme Court summarily affirmed the opinion of the district court in *Wells*, and we are, of course, bound by it. The precedential effect of *Wells*, however, "extends no further than the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (citing *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)). Further, the Court may "'find it appropriate to give full consideration to a question that has been the subject of previous summary action.'" *Bandemer*, 478 U.S. at 121 (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)). We believe that the questions of whether superior court judges are governmental representatives, and whether differences among elected officials bear on establishing a prima facie case of discrimination, relate to the justification offered by NCSBE for the classification rather than to whether RPNC has presented a prima facie case of discrimination.

Rule 12(b)(6) challenge to an at-large method of electing state and city judges).[21]

B.

Having rejected NCSBE's contention that the Equal Protection Clause is not implicated, we now address whether RPNC's complaint sets forth a prima facie case of vote dilution brought about by political gerrymandering.[22] In

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[21] The treatment of *Wells* by the Supreme Court in *Chisom* does not compel a different result. *See Chisom*, --- U.S. at ----, 111 S. Ct. at 2367-68. There, the state maintained that without reliance on the one-person, one-vote principle, courts could not arrive at a manageable standard to adjudicate vote dilution challenges to judicial elections. Because *Wells* foreclosed such reliance, the state's argument continued, judicial elections should be invulnerable to claims of vote dilution. *See id.*

The Court rejected this argument, emphasizing that *Chisom* did not present the question of the appropriate standard to be applied in litigation under § 2 and that, in any event, the "analysis of a proper statutory standard . . . need not rely on the one-person, one-vote constitutional rule." *Id.* at --- n. 32, 111 S. Ct. at 2368 n. 32. Thus, because the Court discussed *Wells* in the context of the standard to be applied to cases questioning the application of the one-person, one-vote rule to the election of judges, we think it is clear that the Court made no statement that *Wells* forecloses claims of vote dilution in regard to the election of judges.

[22] Although a majority of the *Bandemer* Court agreed that political gerrymandering claims are justiciable, the Court did not reach a consensus on the issue of what a plaintiff must allege, and ultimately prove, in order to prevail on a claim of vote dilution in the context of

(continued...)

order to state such a claim, a plaintiff must allege "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127, 106 S. Ct. at 2808. The effect portion of the test "requires a showing of more than a *de minimis* effect." *Id.* at 134, 106 S. Ct. at 2811. Consequently, a plaintiff must complain that an actual or projected history of disproportionate results exists, *id.* at 139, 106 S. Ct. at 2813-14, and that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," *id.* at 132, 106 S. Ct. at 2810. The intent standard set forth in the *Bandemer* plurality opinion is easily met, and we conclude that RPNC's complaint offers sufficient allegations of intent to withstand dismissal under Rule 12(b)(6). *See id.* at 127-29 & n. 11, 106 S. Ct. at 2807-09 & n. 11; Backstrom et al., *supra* note 15, at 298 (observing that the Bandemer "plurality lowered the intent barrier essentially by presuming intent") (footnote omitted); Alfange, *supra* note 15, at 248 (same).

The complaint includes numerous specific allegations of discriminatory intent. RPNC claims that repeated efforts by Republicans to change from statewide to districtwide

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[22](...continued)
political gerrymandering. Because we believe that the plurality opinion provides the "narrowest grounds" for decision, we apply it here. *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977); *see also Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 404 (W.D.Va.1991) (three-judge panel) (applying *Bandemer* plurality opinion).

elections, including proposals offered during consideration of Chapter 509, were rejected by the Democratic-controlled General Assembly, thus revealing NCSBE's intent to operate the election scheme to further discrimination against those affiliating with the Republican Party. In addition, RPNC contends that since the turn of the century only one candidate for superior court judge running on the Republican ticket has been elected and that this is a significant allegation of purposeful exclusion. Importantly, all concede that superior court judges rarely, if ever, perform judicial duties outside their respective districts and divisions, and that the majority of the voters in one part of the state vote for candidates for superior court judgeships from other parts of the state without knowing anything about the various candidates other than the candidates' party affiliation as indicated on the ballot. RPNC avers that these allegations support an inference of bad intent because they reveal NCSBE's resolve to operate an election scheme that isolates those affiliating with the Republican party regarding the election of superior court judges.

In reaching this conclusion, we reject NCSBE's contention that *Bandemer* does not bear on this issue. Pointing out that *Bandemer* addressed intent with regard to the treatment by a legislature of its own election scheme, *see Bandemer*, 478 U.S. at 128, 106 S. Ct. at 2808, NCSBE argues that because RPNC's allegations pertain to a legislatively mandated design for the election of judges, members of a separate branch of government, this controversy lacks the self-interest evident in *Bandemer*. We do not agree, however, that political considerations and party allegiance so easily separate themselves when a legislature devises a

districting scheme for another branch of government. While the self-interest may differ because it extends beyond the legislature to a coordinate branch, the controlling political party may nonetheless act to further its interests throughout the various spheres of government. Consideration of politics is inevitable in design of election schemes because of the political consequences, and we consequently perceive no distinction for purposes of assessing allegations of intent under 12(b)(6) between legislative design of election schemes for the legislature and superior court judges.[23]

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[23] NCSBE further contends that RPNC fails to satisfy the intent element because inclusion of Democrats as plaintiffs prevents RPNC from constituting an "identifiable political group." The plurality opinion in *Bandemer* provides no insight to ascertaining the confines of an acceptable group for purposes of bringing a claim of political gerrymandering. Nonetheless, we consider the inclusion of two Democrats as plaintiffs to be unobjectionable. The complaint states that these plaintiffs have and will continue to vote for Republican candidates for superior court judgeships, thus alleging a sufficient degree of cohesiveness between the Democratic and Republican plaintiffs in order to withstand a motion to dismiss. *See* Michael A. Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 Campbell L. Rev. 207, 234 & n. 128 (1987) ("The most readily identifiable voting group is one based on political affiliation and voting patterns."); *cf. Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S. Ct. 2752, 2769, 92 L. Ed. 2d 25 (1986) (Under § 2 of the Voting Rights Act, that "group members usually vote for the same candidates is one way of proving political cohesiveness" for a claim of vote dilution.). Moreover, the Republican Party of North Carolina alone would be sufficient to constitute an identifiable group. *Cf. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (addressing political gerrymandering claim of registered members of one party).

C.

Having concluded that the complaint contains sufficient statements of intent, we turn to consideration of whether RPNC has alleged an actual discriminatory effect. The Equal Protection Clause is violated in the state political gerrymandering context "only where a history (actual or projected) of disproportionate results appears in" combination with "strong indicia of lack of political power and the denial of fair representation." *Id.* at 139, 106 S. Ct. at 2814. Thus, in order to claim an effect sufficient to state a violation of the Equal Protection Clause, RPNC must allege that the North Carolina voting scheme produces disproportionate results in elections for superior court judges and consistently degrades the influence of Republican voters "on the political process as a whole."[24] *Id.* at 132, 106 S. Ct. at 2810. Clearly, its complaint alleges disproportionate results.[25] RPNC claims that throughout the twentieth century, it has

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[24] We read the phrase "the political process as a whole," *Bandemer*, 478 U.S. at 132, 106 S. Ct. at 2810, to speak to the alleged unconstitutional effects of the challenged electoral scheme on the relevant political sphere. *See* Grofman, *Toward a Coherent Theory*, *supra*, at 50-51. *But see* Daniel H. Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection, in Political Gerrymandering* 64, 82 (Bernard Grofman, ed. 1990). Thus, we confine our analysis to evaluation of the claimed effect of the method of electing superior court judges on the political process of election of superior court judges within North Carolina.

[25] We also observe that RPNC's allegations of effect are sufficient to satisfy the liberal standard applied by the federal courts under Rule 12(b)(6). *See* Wright & Miller, *supra*, § 1356. Whether RPNC ultimately prevails, however, is a matter of proof, and not merely one of the adequacy of the pleadings. *See id.*

been, and continues to be, virtually impossible for a qualified candidate for a superior court judgeship to prevail, if running as a Republican. Specifically, RPNC states that only one Republican superior court judge has been elected in the approximately 220 elections held to fill this office since 1968. Yet, registered Republicans comprise approximately 27 percent of the voting population in North Carolina. Moreover, RPNC claims that consistency of voter habits combined with the geographical distribution of party affiliation throughout the state renders it likely that this trend will continue into the foreseeable future.

An election scheme, however, is not constitutionally infirm merely because it makes the election of a candidate slated by a particular political group more difficult. *Id.* at 131, 106 S. Ct. at 2810. Allegations of disproportionate results alone are insufficient. *Id.* at 131-32, 106 S. Ct. at 2810. "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132, 106 S. Ct. at 2810.

RPNC's complaint sets forth data to support its allegations that not only are the election results disproportionate, but also that the nomination and slating of candidates is affected. Claiming that the method of electing superior court judges inhibits potential Republican candidates from seeking this office, RPNC points to data revealing that in the 1984 and 1986 general elections of 40 judgeships up for election, only four were contested by Republican candidates, and that since 1968, of approximately 220 judgeships up for

election, a Republican candidate offered for election in only ten. RPNC maintains that these data demonstrate that few Republicans will offer to run since the chance of success is almost nonexistent. RPNC also asserts that the method of electing superior court judges diminishes campaign contributions for these elections because potential contributors are unwilling to donate money or other resources to a candidate who is perceived to be an almost certain loser. Thus, the complaint does contain allegations of an effect that goes beyond mere disproportionate election results.[26]

Importantly, Republican success in other elected positions in North Carolina affirms our conviction that RPNC has sufficiently alleged more than a de minimis effect on the political process of electing superior court judges. Data offered by RPNC and NCSBE reveal that Republicans prevail in statewide elections for positions that are truly statewide offices and in districtwide elections for positions in which the officials actually function in a local capacity. For example, district judges in North Carolina, like superior court judges, have statewide jurisdiction, *see* N.C. Gen. Stat. §§ 7A-240, 7A-270 (Michie 1989), but are elected by

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[26] NCSBE implores us to hold that RPNC's complaint fails to satisfy *Bandemer* because it lacks supporting allegations and amounts to little more than a compilation of conclusory statements. *See Badham v. March Fong Eu*, 694 F. Supp. 664, 670-71 (N.D. Cal.1988) (holding that complaint setting forth repetitive and conclusory claims failed to satisfy requirement of *Bandemer* that plaintiff allege exclusion from the political process as a whole), *aff'd mem.*, 488 U.S. 1024, 109 S. Ct. 829, 102 L. Ed. 2d 962 (1989). Our review discloses, however, that the allegations are sufficient in number, detail, and variety of particulars to avoid the problem of repetitive or conclusory statements.

district, *see* N.C. Const. art. IV, § 10; N.C. Gen. Stat. § 7A-140 (Michie 1989). According to RPNC, between 1968 and 1986, nine districts have elected Republicans to this office. It is undisputed that Republican candidates have won the races for Governor in three of the last five elections, that four of the last six elections for United States Senator have resulted in Republican victories, and that currently four of eleven members of the United States House of Representatives from North Carolina are Republicans. In addition, numerous Republicans have been elected to the General Assembly, the North Carolina Court of Appeals, and the North Carolina Supreme Court. Republican strength in North Carolina is sufficient to elect officials when the election base mirrors the area served by the official, focuses the attention of the electorate, and allows the electorate to become informed about the candidates.

Contests for superior court judgeships, on the other hand, involve statewide elections even though the office is essentially a local one and with very few exceptions, candidates are known only within their local areas. This combination of factors -- the status as a statewide candidate for a local office, the requirement to run in a statewide election, and the placement on a ballot with numerous other candidates seeking the same office but from different local districts -- encourages and as history has demonstrated, results in straight-party voting. Voters have little incentive to focus on individual candidates who reside in other districts and thus will discharge their duties in areas of the state distant from the voters' local area.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

We recognize that RPNC has not alleged that Republicans have been "excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected," *Bandemer*, 478 U.S. at 137, 106 S. Ct. at 2813, and that to the extent *Bandemer* might be read to require such allegations in order for a political group to allege exclusion from the political process as a whole, RPNC's claims would fail. However, we cannot conclude that a political party that has clearly alleged an effect that amounts to more than disproportionate election results must also allege and ultimately prove this type of exclusion. To do so would hold, in effect, that regardless of the specific allegations of its complaint an identifiable political group could not survive a motion to dismiss or prevail on the merits of its claim. We decline to adopt a construction of *Bandemer* that would render nugatory its holding that political groups may bring claims of partisan gerrymandering.

In determining whether a group has been shut out of the political process as a whole, the Supreme Court considers it relevant to examine the responsiveness of the elected official to the interests of the minority political group. *See id.* at 131, 106 S. Ct. at 2809-10. RPNC concedes that it has no complaint concerning the performance of superior court judges, that while elected judges are representative governmental officials, they do not represent constituents in the same sense as elected members of the legislative and executive branches, and that consequently, superior court judges could not be found to inadequately represent minority group interests. Nevertheless, the fact that superior court judges perform a different representative function does not

mean an identifiable political group should have no protected rights in electing them once a state chooses to select judges through an election system that allegedly fails to comport with the Fourteenth Amendment. We hold, therefore, that RPNC has set forth allegations of an actual discriminatory effect sufficient to state a claim of vote dilution brought about by political gerrymandering.

D.

Our conclusion that RPNC has set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim, we emphasize, is narrow and wholly dependent on the egregious nature of the alleged systemic discrimination. *See* Alfange, *supra* note 15, at 179 (arguing that judicial intervention should be limited to cases displaying flagrant and obvious abuse to avoid "exposing virtually every districting plan to judicial scrutiny"). The confluence of the alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina, and the certainty of a similar future, compels our holding. Indeed, we believe that if RPNC had alleged even a modicum of electoral success or access to the political process, its claim might not have withstood a challenge under Rule 12(b)(6). And, whether RPNC ultimately will prevail on its claim is not before us.

We remain mindful of Justice Frankfurter's admonition that courts should remain reticent to become ensnared in the "political thicket" of adjudicating gerrymandering claims, *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct.

1198, 1201, 90 L. Ed. 1432 (1946), and of the more recent concern expressed by Justice O'Connor in *Bandemer* that judicial consideration of claims of political gerrymandering will inevitably lead to a constitutional requirement of "some form of rough proportional representation for all political groups," *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring in judgment); *see also* Alfange, *supra* note 15, at 186-87 (discussing evils of proportional representation). We fully share these apprehensions. Nonetheless, we remain bound by the dictates of *Bandemer*. *See United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L. Ed. 49 (1801).

V.

RPNC also maintains that the North Carolina method of electing superior court judges infringes upon its rights to free speech and association in violation of the First Amendment. Specifically, RPNC argues that the electoral system prevents Republicans from fully and effectively participating in the political process, chills the desire of Republicans to engage in vigorous debate and to seek superior court judgeships, and constitutes a state-imposed, de facto requirement of political affiliation with the Democratic Party.[27] Because

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[27] In *Badham*, 694 F. Supp. at 675, the district court rejected a similar First Amendment claim based on political gerrymandering. At oral argument, NCSBE argued that the summary affirmance of *Badham*, 488 U.S. 1024, 109 S. Ct. 829, 102 L. Ed. 2d 962, bound this court and required our rejection of this claim, *see Anderson*, 460 U.S. at 784 n. 5, 103 S. Ct. at 1568 n. 5 (precedential effect of summary affirmances applies to no more than the exact issue decided). However, the First

(continued...)

the authority offered by RPNC is readily distinguishable and its reasoning is not compelling, we conclude that RPNC fails to state a claim under the First Amendment.[28]

A.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs. This of course includes discussions of candidates, . . . the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S. Ct. 1434, 1436-37, 16 L. Ed. 2d 484 (1966). In addition, it is clear that "[t]he First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct.

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[27](...continued)
Amendment issue raised before the district court was not presented to, and consequently was not decided by, the Supreme Court, *see Badham v. March Fong Eu*, 56 U.S.L.W. 3822 (U.S. May 31, 1988) (No. 87-1818). Therefore, we conduct an independent inquiry into the sufficiency of RPNC's First Amendment claims.

[28] This court has held that in voting rights cases, no viable First Amendment claim exists in the absence of a Fourteenth Amendment claim. *See Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir.1989) (First Amendment offers no protection of voting rights *beyond* that afforded by the Fourteenth and Fifteenth Amendments.), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990); *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981) (same), *cert. denied*, 457 U.S. 1120, 102 S. Ct. 2933, 73 L. Ed. 2d 1333 (1982). Since RPNC has stated a Fourteenth Amendment claim, we must address the First Amendment issues.

612, 632, 46 L. Ed. 2d 659 (1976) (per curiam). RPNC asserts that the First Amendment protects the rights of citizens to cast an effective vote regardless of political persuasion and to effectively associate for the advancement of political beliefs. Because the North Carolina election system prevents Republicans from electing the candidates of their choice for superior court judgeships, RPNC contends that these alleged rights have been violated.

RPNC confuses the protection offered by the First and Fourteenth Amendments, and in so doing, attempts to extend the guarantees of the First Amendment.[29] As noted previously, the Equal Protection Clause of the Fourteenth Amendment ensures equal weighing of votes, or to use RPNC's terms, equal effectiveness of votes. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The First Amendment, in contrast, protects the right to cast an effective vote by prohibiting restrictions

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[29] We recognize that there is scholarly support for the extension of the ballot access reasoning to political vote dilution claims. *See, e.g.*, Hess, *supra* note 23, at 231-32 ("A first amendment analysis provides an effective means of balancing the constitutional interests of political parties . . . in light of the legitimate interests of the state."); Emily M. Calhoun, *The First Amendment And Distributional Voting Rights Controversies*, 52 Tenn. L. Rev. 549, 588-598 (1985) (if state uses opinion as basis for distribution of votes, state must show compelling state interest); Harris Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & Pol. 357, 373 (1984) (Political gerrymanders "strike at the heart of the rights of free speech and free association" because they "are designed to limit the effectiveness of organized political activity."). We find these arguments unpersuasive, and therefore decline to apply them here.

on ballot access that impair the ability of citizens to express their political preferences, or that limit the opportunity for citizens to unite in support of the candidate of their choice. *See Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 794, 103 S. Ct. 1564, 1569-70, 1572-73, 75 L. Ed. 2d 547 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 990, 59 L. Ed. 2d 230 (1979). The North Carolina method of election for superior court judges does not entail direct impediments prohibited by the First Amendment. Unlike the complainants in the ballot access cases, Republicans in North Carolina may run for superior court judgeships, vote for the candidate of their choice, and associate together in support of their chosen candidate. Although the North Carolina method of election of superior court judges does prevent the realization of Republican political goals, Republicans are not prevented from participating, as individuals or as a group, in the election of superior court judges. The First Amendment guarantees the right to participate in the political process. It does not guarantee political success.

B.

RPNC also asserts that the system of electing superior court judges chills the rights of Republicans to engage in vigorous debate, and to seek superior court judgeships in violation of the First Amendment. A chilling effect occurs when a substantially overly-broad law deters persons whose expression is constitutionally protected from exercising their First Amendment rights. *See New York v. Ferber*, 458 U.S. 747, 768-73, 102 S. Ct. 3348, 3360-63, 73 L. Ed. 2d 1113 (1982). Absent a governmental action that threatens to

punish protected speech, the substantial overbreadth doctrine does not apply, and a chilling effect does not occur. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-618, 93 S. Ct. 2908, 2915-19, 37 L. Ed. 2d 830 (1973). The North Carolina laws at issue do not subject Republicans to the threat of civil or criminal penalties for engaging in political expression. *See* N.C. Const. art. IV, § 16; N.C. Gen. Stat. §§ 163-104, 163-106(i) (Michie 1991). Election practices that do not threaten to penalize protected speech, but that may have some effect on the decision whether to seek candidacy or engage in debate, are not overly broad. Thus, RPNC's overbreadth claim does not give rise to a constitutional infringement.

C.

Finally, RPNC argues that because the government may not unjustifiably require an individual to choose between accepting public employment and taking action contrary to their chosen political affiliation, *see, e.g., Elrod v. Burns*, 427 U.S. 347, 359-60, 96 S. Ct. 2673, 2683, 49 L. Ed. 2d 547 (1976), the Democratic-controlled legislature may not similarly require individuals to choose between political office and affiliation with the Republican Party. That the hiring of low-level public employees may not be predicated upon political party affiliation is clear, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64-65, 110 S. Ct. 2729, 2732, 111 L. Ed. 2d 52 (1990);[30] however, North Carolina superi-

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[30] Political party affiliation may be an appropriate consideration if the position is one that requires as a qualification for its performance, (continued...)

or court judges are elected public officials rather than employees hired by the government. This distinction between the government as hiring authority versus the electorate as hiring authority is crucial. An employee's right to free speech is violated only when government inappropriately requires an employee to affiliate with a certain party. *Id.* at 73-79, 110 S. Ct. at 2736-39. On the other hand, the electorate does not operate under this constraint. *Cf. Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 1033, 47 L. Ed. 2d 196 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state."). Seeking to avoid the result that follows from this proposition, RPNC argues that by prescribing the current method of election the legislature, a governmental body, has usurped the electorate's selection function. We are not persuaded. The North Carolina electorate, not the General Assembly, selects superior court judges. Therefore, RPNC has failed to state a claim for the infringement of its rights to free speech and association in violation of the First Amendment.

VI.

In sum, we hold that RPNC's claim of political gerrymandering in the election of North Carolina superior court judges presents a justiciable question and that its complaint states a claim upon which relief may be granted under the Fourteenth Amendment. We further hold that

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[30](...continued)
affiliation with a particular political party. *Rutan*, 497 U.S. at 64-65, 110 S. Ct. at 2732.

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS CONTINUED . . .

RPNC has failed to state a claim under the First Amendment. Thus, we reverse in part, affirm in part, and remand for further proceedings consistent with this opinion.

REVERSED IN PART; AFFIRMED IN PART; AND REMANDED.

DISTRICT COURT ORDER OF JUNE 6, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 88-263-CIV-5-F

REPUBLICAN PARTY OF NORTH CAROLINA, et al., Plaintiffs,	)	
v.	)	ORDER
JAMES G. MARTIN, Governor of North Carolina, et al., Defendants,	)	
and	)	
NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, Defendant-Intervenor.	)	

NATURE OF THE CASE

Plaintiffs have brought this action pursuant to 42 U.S.C. § 1983, claiming that the present method by which Superior Court judges are elected in North Carolina (district nomination followed by statewide election) denies plaintiffs the equal protection of the laws by "structurally diluting" the voting franchise of Republican voters and violates their First and Fourteenth Amendment rights of freedom of speech and association. Plaintiffs also bring a federal constitutional

challenge to the candidate residency requirement for Superior Court judges, which since 1987 has required that a candidate for nomination for a Superior court judgeship be resident, at the time of filing a notice of candidacy, in the district he or she wishes to serve. In addition, plaintiffs assert various State law claims.

Plaintiffs herein include the Republican Party of North Carolina, a statutorily recognized political party, see N.C. Gen. Stat. § 163-96, registered Republican voters, and those voters who, although not registered as Republicans, predictably vote for Republican candidates, and are thus Republican voters. The individual plaintiffs also include three former unsuccessful Republican candidates for Superior Court. Defendants herein are sued in their official capacities as those officers and officials who are responsible for conducting elections according to the method established by the North Carolina General Assembly. The defendant-intervenor, the North Carolina Association of Black Lawyers ("NCABL"), is a statewide organization of black lawyers and law students.

This matter is now before the court on defendants' Motion to Dismiss this entire action, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The facts, undisputed except as otherwise noted, are as follows:

All North Carolina judges were appointed until the State Constitution was rewritten in 1868. J. Sanders, A

Brief History of the Constitutions of North Carolina (1983). Since 1868, the State Constitution has provided that it is the General Assembly's prerogative to decide whether resident Superior Court judges are to "be elected by the qualified voters of the State or by the voters of their respective districts." N.C. Const. art. IV, § 16. The State Constitution has further required, also since 1868, that a Superior Court judge "reside in the district for which he is elected." N.C. Const. art. IV, § 9(1). Ultimately, the legislature adopted a statewide election system in 1877, Ch. 255, Public Laws 1876-77, and has maintained it continuously since that time.

In 1915, the General Assembly adopted a primary system for political parties to nominate their candidates, Ch. 101, Public Laws 1915, and since that time candidates for Superior Court have been nominated in primaries held in the districts for which they wish to serve. Candidates in the primary run at large within the district for that election year. Although no statute by itself specifies district primaries, the State Board of Elections has always used district nominations, regardless of the party holding a majority of the board. In addition, various provisions of the State election law indicate acceptance of the practice by the General Assembly. For example:

> -- N.C. Gen. Stat. § 163-156(c)(2) provides that for certain vacancies occurring after filing has begun, nomination of candidates for Superior Court judge are to be made "by the appropriate district executive committee of each political party." (Emphasis added.)

> -- N.C. Gen. Stat. § 163-106(i) requires residence in a district in order to file notice of candidacy.
>
> -- N.C. Gen. Stat. § 163-109 provides that county boards of elections are to furnish ballots for all offices where district primaries are conducted, and lists Superior Court judge among those offices.
>
> -- N.C. Gen. Stat. § 163-114 provides that, if a party nominee for Superior Court judge dies, resigns or is disqualified before the general election, the vacancy is to be filled only by the party executive committee members living in the judicial district.

Finally, when North Carolina's method of electing Superior Court judges was challenged in Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), a three-judge district court apparently concluded that the legislature intended district primaries even though no single statute authorized the procedure. See id. at 930 ("The General Assembly has prescribed that the regular judges shall be nominated in a primary election conducted in their respective districts but shall be elected in the general election by statewide vote.").

The North Carolina Constitution requires the General Assembly to divide the State into Superior Court judicial districts and to provide for the election of Superior Court judges. N.C. Const. art. IV, § 9(1). The counties of North Carolina are organized into four judicial divisions which,

until 1987, were divided into a total of thirty-four judicial districts. Each division and judicial district contained one or more counties and one or more resident Superior Court judges. Most of the judicial districts encompassed more than one county and all districts followed county boundary lines. Seventeen of the judicial districts had more than one judge and those districts had forty-three of the sixty-four resident Superior Court judges.

Pursuant to Chapter 509 of the Session Laws of 1987 ("Chapter 509"), many of the judicial districts were split, and there are now sixty judicial districts. In forming the new judicial districts, counties frequently were split, and some districts now consist of parts of more than one county. Sixteen of the new judicial districts did not contain a courthouse and had no separate clerk of court or other official associated with the traditional judicial districts, except for the resident Superior Court judge assigned thereto.

This court has previously recognized that "[o]ne effect of [Chapter 509] was to give black voters a more equal opportunity to participate in the political process and to elect superior court judges of their choice." Order of October 4, 1988, at 5. Plaintiffs do not challenge the new judicial districts, but do allege that the configuration thereof was designed to include an incumbent Democratic Superior Court judge[1], and that this configuration, coupled with continued statewide election, is evidence of the defendants intent to

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[1] Inasmuch as at the time of the enactment of Chapter 509, all Superior Court judges were Democrats, no other result could have been obtained without the removal of an incumbent from office.

perpetuate the Democratic dominance of the Superior Court judiciary. Defendants deny this allegation.

In its consideration of Chapter 509, the General Assembly's Democratic majority rejected amendments offered by Republican legislators and supported by Governor James G. Martin ("Governor Martin"), a Republican, which would have eliminated the statewide election of resident Superior Court judges, and, instead, would have provided for district election. Plaintiffs contend, and defendants deny, that the Democratic majority did so out of a desire to protect Democratic incumbents from defeat by Republicans in the general election.

As the court noted in its October 4, 1988, Order, on at least eight occasions since 1961, Republican members of the legislature have introduced and sought passage of various types of legislation to provide for district-based (or division-based) elections for Superior Court judges. Order at 5-6. The Democratic-controlled General Assembly has defeated each effort. Plaintiffs contend, and defendants deny, that the sole reason the Democratic majority defeated the bills was its desire to preclude any probability of a Republican ever being elected to a Superior Court judgeship.

The North Carolina Constitution mandates that Superior Court judges ride circuit. N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions."). As previously stated, the state currently is divided into four divisions, the largest of which contains thirty-two counties.

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

Although the geographic areas served by resident Superior Court judges have not been constant in the historical past, since 1915 the judges have rotated district to district within their respective divisions. The Courts of Yesterday, Today and Tomorrow in North Carolina, 24 Popular Govt. 11 (1958). Today, rotation of judges is carried out according to a predetermined schedule. Periodically, the judges of each division prepare a rotation schedule for the division and submit it to the Chief Justice, who examines it to ensure that a judge serves a six-month period in each district lying within his division for each regular judgeship allotted to the district. An effort is made to provide that, over a period of time, each judge will preside over sessions of court in every district of his division.[2]

In addition to mandated rotation, the Chief Justice may assign the judges to hold court outside their divisions, N.C. Const. art. IV, § 11, as said judges have statewide jurisdiction and duties, id. at art. IV, § 12(3). Assignment out of division occurred an average of 3.09% of the time (an annual average of 87 times) in the years from 1980 through 1987.

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[2] In an apparent attempt to somehow bolster their First Amendment claim, plaintiffs bring to the court's attention the fact that the North Carolina Administrative Office of the Courts temporarily suspended judicial rotation from October 1, 1990, until March 31, 1991, as a cost-cutting measure. See Exhibit A to Plaintiffs' Memorandum. Plaintiffs own exhibit shows that this suspension was a temporary, cost-cutting measure; and, particularly in view of the court's legal analysis infra. said suspension is not relevant to the instant action.

Before the enactment of Chapter 509, eight special Superior Court judges, appointed rather than elected, were available to be employed in districts where court overload or protracted or sensitive litigation required assistance from outside judges. Chapter 509 eliminated these judgeships.

Resident Superior Court judges exercise numerous unique statutory powers in the judicial district for which they are elected. For example, the Senior Resident Superior Court judge for a district appoints the Public Defender, N.C. Gen. Stat. § 7A-466, as well as fills vacancies in the Office of Clerk of Superior Court, N.C. Gen. Stat. § 7A-100. A Superior Court judge may also hear the return of a restraining order in the district in which he is resident. N.C. Gen. Stat. § 1-494.

Until Judge Howard Manning, Jr.'s 1988 election, no Republican candidate for Superior Court judge had been elected in this century. Since 1968, ten Republicans have run for resident Superior Court judge, and in four of these contests the Republican candidate would have been successful if resident Superior Court judges were elected by the qualified voters of the judicial district in question, rather than by statewide election. Complaint, para. 34. But, "[b]ecause an overwhelming majority of North Carolina's voters are Democrats and nominees for judicial office usually have no statewide reputation, the nominees of the Democratic Party invariably prevail in the statewide general elections." Republican Party v. Martin, 865 F.2d 1259, slip op. at 3 (4th Cir. 1988) (Table) (Unpublished).

North Carolina's system of electing Superior Court judges has been the subject of legal challenges in the past,

and certain legal principles have emerged from those earlier decisions. In Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807 (1972), the three-judge district court and the United States Supreme Court rejected a Republican voter's claim that the State's combination of district nomination and statewide election violated the Fourteenth Amendment. The district court, after concluding that Superior Court judges in North Carolina are "hybrid officials with both local and statewide functions and authority," id. at 933, stated that "[t]here can be no doubt as to the validity of the provisions of the North Carolina Constitution requiring the election of Superior Court judges by districts or statewide as prescribed by the legislature . . . or that they reside in their respective districts." Id. at 930 (citations omitted). The court also rejected the plaintiff's argument that the electoral system impermissibly diluted his or other persons' voting strength: the "hybrid" nature of Superior Court judges' mixture of local and statewide duties, according to Holshouser, provides "a reasonable basis for the election procedure" mixing district and statewide voting. Id. at 933.

In Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd, 477 U.S. 901 (1986), this court held that North Carolina Superior Court elections are subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Thus, any changes in judicial elections must be precleared by the United State Department of Justice to ensure compliance with the federal Voting Rights Act.

The case of Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. 1987), involved a challenge to the State's Superior Court elections based on both Section 2 of the

Voting Rights Act, 42 U.S.C. § 1973(b), and the Fourteenth Amendment. The Alexander plaintiffs, who included as a plaintiff-intervenor the NCABL, alleged that certain features of the election system had the purpose and effect of abridging non-white voting strength in Superior Court elections. The plaintiffs sought the elimination of staggered terms within multi-member judicial districts and the redrawing of district lines so as to enhance the ability of non-white voters to nominate and elect judicial candidates of their choice. Alexander was settled by a consent decree upon adoption by the North Carolina General Assembly of Chapter 509 of the Public Laws of 1987. Republican Party v. Martin, 866 F.2d 1259 (Table), slip op. at 4.

Defendants argue that Chapter 509, which is a target of plaintiffs Complaint in the present action, was enacted in part to meet the requirements of the Voting Rights Act and the concerns of the United States Attorney General and the Alexander plaintiffs. Defendants' argument is supported by the fact that the Alexander case was settled, and by the decision of the United States Attorney General, who precleared Chapter 509 on September 25, 1987, pursuant to Section 5 of the Voting Rights Act. As previously noted, the legislation maintained the State's long-standing combination of district nomination and statewide election of Superior Court judges, and eliminated staggered terms. It also redrew district lines in order to increase the number of non-white majority districts, apparently from two out of thirty-four to nine out of sixty. See also Republican Party v. Martin, 865 F.2d 1259 (Table), slip op. at 4 ("by design, a number of districts were created in which there were black voting majorities").

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Chapter 509 also adopted, for the first time in the State's history, a requirement that a candidate for nomination for a Superior Court judgeship be resident, at the time of filing a notice of candidacy, in the district in which he or she wishes to serve. The legislation states that this requirement "implements Article IV Section 9(1) of the North Carolina Constitution which requires regular Superior Court Judges to reside in the district for which elected." N.C. Gen. Stat. § 163-106(i). Plaintiffs allege, and defendants deny, that this requirement denies plaintiffs the equal protection of the laws and violates their First and Fourteenth Amendment rights of freedom of speech and association.

Governor Martin, a defendant in the present action, filed a complaint in his official and individual capacities in State court in December 1987, claiming that certain provisions of Chapter 509 violate the North Carolina Constitution. State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989). In particular, the Governor asserted that Chapter 509 infringed the State constitutional rights of voters, and of candidates; that the legislation had usurped the executive authority of the Governor; and that the legislation's pre-candidacy residency requirement unconstitutionally denies otherwise qualified candidates the right to seek office. A unanimous North Carolina Supreme Court rejected all of the Governor's contentions, holding that Chapter 509 "does not violate our State Constitution and is fully effective." Id. at 462, 385 S.E.2d at 486. The court found that the express and actual purposes of Chapter 509 were to provide for compliance with the federal Voting Rights Act and to improve the administration of justice. Id. at 450-51 n. 2, 385 S.E.2d at 479-80 n. 2.

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

Plaintiffs initiated the present action in the United States District Court for the Middle District of North Carolina on November 4, 1987, and the case was transferred to this Court on March 29, 1988. Republican Party v. Martin, 682 F. Supp. 834 (M.D.N.C. 1988). The NCABL filed a motion to intervene, which this court denied on April 14, 1988. Said denial was reversed by the Fourth Circuit Court of Appeals, which observed that the NCABL "obtained what it appears to have wanted by the enactment of Chapter 509" and that "one may readily see" that the State's system of electing Superior Court judges, as modified by Chapter 509, better serves black voters' interests than the individual district elections sought by plaintiffs. Republican Party v. Martin, 865 F.2d 1259 (Table), slip op. at 5, 6.

After this ruling, discovery proceeded and plaintiffs noticed their intention to take the depositions of several members of the North Carolina General Assembly. On May 14, 1990, this court granted defendants' motion to quash plaintiffs' deposition subpoena addressed to State Representative Daniel T. Blue, holding that Representative Blue was "entitled to assert his common law legislative immunity to protect himself from being deposed concerning his legislative activities." Order of May 14, 1990, at 8.

This matter is now before the court on defendants' March 12, 1991, Motion to Dismiss this action, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the grounds that: (1) the Complaint raises a non-justiciable political question, (2) plaintiffs have not stated causes of action under either the First or Fourteenth Amendments, and (3) the action transgresses the doctrine of legislative immunity. Defendants have set forth the grounds and authorities supporting their

motion in an accompanying memorandum (henceforth, "Defendants' Memorandum"). Defendant-intervenor NCABL has submitted a memorandum joining in defendants' Motion to Dismiss. The NCABL expressly adopts defendants' arguments that the Complaint presents a non justiciable political question and that the plaintiffs have not stated causes of action under the First and Fourteenth Amendments. It takes no position on defendants' alternative argument that the action should be dismissed because of the doctrine of legislative immunity. Defendant Intervenor's Response to Defendants' Motion to Dismiss at 1. The plaintiffs have submitted a Memorandum in Opposition to Defendants' Motion to Dismiss (hereinafter, "Plaintiffs' Memorandum," or "Response"), and defendants have tendered a Reply Memorandum to the same. Accordingly, defendants' Motion to Dismiss is now ripe for ruling.

For the reasons discussed infra, the court finds defendants' first ground for dismissal (ie., that the Complaint raises a non-justiciable political question) to be persuasive, and, accordingly, GRANTS defendants' Motion to Dismiss

on this ground.[3] The court thus need not -- and does not -- address defendants' second and third arguments.

DISCUSSION

The Complaint in the present action could be interpreted as addressing a wide variety of political claims, and it therefore is necessary to distill from it the legal issues it attempts to raise, before turning to the merits of the issues raised.

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[3] Defendants' Motion to Dismiss comes nearly three and one-half years after the filing of this action. Defendants' first two grounds for dismissal are of a purely legal nature, for which little or no discovery was necessary, and none of the relevant cases cited in Defendants' Memorandum concerning these arguments was decided after 1989. Defendants' third argument, which concerns legislative immunity, is based on an order entered by this court on May 14, 1990. Had this Motion to Dismiss been filed sooner, the parties and the court would have avoided the waste of much judicial and private resources. See, e.g., Republican Party v. Martin, ___ F.R.D. ___, 1991 WL 56425 (E.D.N.C. 1991) (individual review by the court of 369 of Governor Martin's documents after he had opposed discovery of the same on the grounds of executive privilege, attorney-client privilege, and work product protection).

That much having been said, the court notes that Defendants' Memorandum and Reply Memorandum are exceptionally well briefed, as is plaintiffs' Response, and are in keeping with the high standard of advocacy exhibited by all the parties throughout the course of this litigation.

I.

PLAINTIFFS ACTUALLY SEEK RELIEF AGAINST ONLY SOME OF THE ELECTORAL PRACTICES DISCUSSED IN THEIR COMPLAINT

Plaintiffs enumerate four aspects of North Carolina's method of electing Superior Court judges that in their view are unlawful: Statewide general elections, Complaint, para. 46; the requirement that candidates run for judgeships in particular districts, id. at para. 47; district nominations, id. at para. 48; and the pre-registration residency requirement for Superior Court candidates, id., at para. 49.

All of these practices are alleged to have the purpose and synergistic effect of infringing the plaintiffs' First Amendment rights and of restricting the influence of Republican voters on the political process as a whole in violation of the Fourteenth Amendment. Plaintiffs' Complaint also contains a lengthy litany of grievances stemming from actions taken by the North Carolina General Assembly's Democratic majority vis-a-vis the Republican minority. However, the court perceives that plaintiff's federal constitutional argument is directed almost entirely against the practice of statewide elections for Superior Court judgeships as it exists in conjunction with district-wide nomination, and, to a lesser extent, against the pre-registration residency requirement.

Although plaintiffs assert that nomination by district primary and statewide election to particular judgeships violate the Fourteenth Amendment and lack State statutory authority, Complaint, paras. 25, 26, 47, 48, the chief form

of relief they seek would involve enforcing by injunction one aspect of current North Carolina law. Prayer for Relief, para. 2.[4] In fact, plaintiffs are critical of district nomination and district specific election only insofar as they exist in conjunction with the statewide election of Superior Court judges. Complaint, paras. 50, 51. If this court were to grant the injunction plaintiffs request, candidates for Superior Court judgeships would continue to seek nomination through district primaries, as under current law; candidates for Superior Court judgeships would continue to be elected to serve in particular districts, as under current law[5]; and

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[4] The two substantive paragraphs in the Plaintiffs' prayer for relief, Prayer for Relief, paras. 1, 2, read:

1. A declaration that the voting customs, practices and procedures complained of herein constitute unlawful structural dilution of the voting franchise of Republican Voters and an unlawful restriction of their fundamental rights of freedom of speech and association.

2. A preliminary and permanent injunction prohibiting the defendants from conducting elections for resident Superior Court judge under the existing system and an order that such elections be conducted by judicial district (without a candidacy residency requirement) for both nomination and election in such a manner as does not unlawfully discriminate against Republican candidates and Voters.

[5] Plaintiffs assert that this requirement of current law -- which, it should be emphasized, they do not seek to change -- constitutes a "numbered post" system. Complaint, para. 27. This is an incorrect use of the term, which refers to the practice of requiring candidates for office in multi-member districts to run for specific seats. As the North Carolina Supreme Court has observed, "neither numbered seats nor staggered terms exist in multi-seat judicial districts in North Carolina after the passage of Chapter 509." State ex rel. Martin v. Preston, 325 N.C. at 450-51 n. 2, 385 S.E.2d at 479-80 n. 2.

Superior Court judges would be required to reside in their particular districts once elected, as under current law. Thus, plaintiffs' Complaint boils down to a request that this court find the State's long-standing choice of choosing Superior Court judges by combining district-wide primaries with statewide general elections, unconstitutional. See also Order of October 4, 1988, at 1 ("Plaintiffs challenge the voting custom, practice, or procedure of district nomination followed by statewide election of [Superior Court] judges as violative of the first and fourteenth amendments to the United States Constitution.").

II.

PLAINTIFFS' STATE LAW CLAIMS

The plaintiffs' state law claims may be dealt with summarily. The assertion that nomination by district or election to specific districts lacks statutory authority is without merit. While no specific statute prescribes either practice, the General Assembly repeatedly has enacted statutes predicated on the existence of both, most recently in the candidate residency requirement at issue in this action. See supra at pp. 3-4. Moreover, as also discussed supra at pp. 3-4, the State Board of Elections, which is statutorily charged with administering the State election laws, has followed these practices continuously since 1915. See also N.C. Gen. Stat. § 163-22(a) (empowering Board to make reasonable rules and regulations); Comm'r of Insurance v. N.C. Automobile Rate Administrative Office, 294 N.C. 60, 67, 241 S.E.2d 324, 329 (1978) (according weight to the "construction of statutes adopted by those who execute and administer them").

Plaintiffs' State constitutional challenge to Chapter 509's candidate residency requirement has been foreclosed definitively by the North Carolina Supreme Court in Preston, 325 N.C. 438, 385 S.E.2d 473.

III.

PLAINTIFFS' FEDERAL CONSTITUTIONAL CHALLENGE TO THE RESIDENCY REQUIREMENT

The court finds plaintiffs' federal constitutional challenge to the candidate residency requirement to be unavailing. The court perceives that said challenge has been foreclosed by the Supreme Court's summary affirmance in Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff'd mem., 401 U.S. 968 (1971) and 405 U.S. 1035 (1972), even if the court assumes, arguendo, that partisan motives played a part in its enactment.

In Hadnott, a black plaintiff challenged Alabama's one-year prior residency requirement on candidates for state circuit judgeships. Despite allegations that the residency requirement discriminated against the political rights of black voters and candidates, 320 F. Supp. at 122, and an undeniable history of racial discrimination in voting rights, the district court and the Supreme Court upheld the requirement. Because of the nature of the office of an Alabama circuit judge -- an office very similar to that of a North Carolina Superior Court judge, see id. at 119-121 -- the Hadnott district court found "a compelling state interest in exposing to the voters for a substantial period of time before election the person who will be a candidate for state circuit judge." Id. at 119-20. Where a state has chosen to elect the judges

of its trial courts of general jurisdiction, Hadnott holds that imposition of a residency requirement for judicial candidates serves important interests of the state and of the voters. Id. at 119-121.

And, where the residency requirement is not unreasonable in the length of time required, it does not violate the Constitution. See Clements v. Fashing, 457 U.S. 957, 967-72 (1982) (plurality) (The Court, in rejecting First Amendment and Equal Protection challenges to a two-year "waiting period" for certain officeholders seeking to run for a state legislature, commented that "[a] 'waiting period' is hardly a significant barrier to candidacy," held that "this sort of insignificant interference" need only rest on a "rational predicate" in order to survive constitutional challenge, and noted that it had "upheld a 7-year durational residency requirement for candidacy," in Chimento v. Stark, 414 U.S. 802 (1973), summarily aff'g 353 F. Supp. 1211 (N.H.)."). See also Sununu v. Stark, 383 F. Supp. 1287 (D.N.H. 1974), aff'd mem., 420 U.S. 958 (1975) (upholding 7-year residency requirement for state senatorial candidates). Cf. Billington v. Hayduk, 439 F. Supp. 975, 978-79 (S.D.N.Y. 1977) (distinguishing Hadnott and invalidating a "merely arbitrary" five-year residency requirement for county executives), aff'd on other grounds, 565 F.2d 824 (2d Cir. 1977). North Carolina's residency requirement for those persons seeking to file a notice of candidacy is certainly not unreasonable in the length of time required. All that is required is that the potential candidate be, "at the time of filing the notice of candidacy a resident of the judicial district as it will exist at the time the person would take office if elected." N.C. Gen. Stat. § 163-106(i).

Accordingly, as the Supreme Court of North Carolina recently found, the candidate residency requirement of Chapter 509 is a "reasonable interpretation" of the State Constitution's residency requirement for judges, Preston, 325 N.C. at 462, 385 S.E.2d at 486. The existence of this valid and important basis for the residency requirement renders it constitutionally valid even if, as plaintiffs allege, partisan motives also played a role in the requirement's creation.[6]

In any event, the plaintiffs' complaint against the residency requirement appears to be that the residency requirement "aggravates the gross mathematical inequality of voting power among nomination districts and arbitrarily and capriciously renders the processes leading to nomination and election unequal for similarly situated potential candidates," because attorneys who live in less populated judicial districts are given an unequal opportunity to be nominated for office

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[6] The court notes that, while plaintiff's allegation of partisan motivation must be accepted for the purposes of the present Motion to Dismiss, only a slim basis for the allegation is alleged, resting as it apparently does on a letter from counsel for the NCABL to the United States Department of Justice written during that Department's preclearance review of Chapter 509 under the Voting Rights Act. See Complaint, para. 12 and Exhibit B. Read in context and as a whole, the letter expresses the belief of counsel that the candidate residency requirement was designed to further the ability of minority voters in the newly created non-white majority districts to elect candidates of their choice, a purpose that furthers the goals of the Voting Rights Act and thus, ultimately, of the Equal Protection Clause itself. Such a reading does not indicate that its author believed that "the residency requirement was solely and directly intended to discriminate against Republican candidates and Voters." Complaint, para. 12. The court also notes that a single letter from counsel in ongoing litigation against the State (the Alexander case) is a weak indication of the intention of the State legislature.

compared to those candidates who live in more heavily populated districts. Plaintiffs' Memorandum at 4-5. The court perceives this to be a suggestion that the one person/one vote standard applies to judicial elections, a suggestion rejected by the Supreme Court in Wells v. Edwards, 409 U.S. 1095 (1973), as discussed in greater detail infra.

IV.

PLAINTIFFS' GERRYMANDERING CHALLENGE[7]

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[7] Plaintiffs' initial response to defendants' justiciability argument consists of the assertion that this court implicitly decided the question in plaintiffs' favor by denying their motion for a preliminary injunction. Plaintiffs' Memorandum at 10-11. This assertion is incorrect: this court has not yet decided the question of justiciability. Plaintiffs themselves quote this court's observations at the September 21, 1988, hearing on the motion for a preliminary injunction, in the course of which the Court stated that "I am inclined to think that the issue is justiciable but I want to emphasize again that these are not final opinions on my part but just observations." Id. at 11 (emphasis added). Plaintiffs claim that the court's Order of October 4, 1988, "implicitly found those issues [raised by plaintiffs] to present an appropriate occasion for judicial determination." Id. Said Order did nothing of the sort. Instead, it rejected plaintiffs' argument that they had demonstrated the likelihood of success on the merits necessary to justify issuance of a preliminary injunction. In doing so, the court wrote that Davis v. Bandemer, 478 U.S. 109 (1986), while holding that "certain group rights under the equal protection clause are justiciable . . . d[id] not supply the answer to the issue raised herein [as to the justiciability of the plaintiffs' claims]." Order at 11. The plaintiffs' current attempt to recast this court's explicit refusal to decide the justiciability question in their favor as such a ruling is without merit.

(continued...)

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

Before 1986, it was widely assumed that claims of "political gerrymandering" were "political questions" and, as such, were not subject to judicial resolution. See, e.g., J. Nowak, R. Rotunda and J. Young, Constitutional Law, 800 (2d ed. 1983) (contrasting political gerrymandering with unconstitutional racial gerrymandering). The Supreme Court has described the political question doctrine as applying to cases in which there is present

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifari-

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[7](...continued)

Plaintiffs' citation of Bandemer in this regard, Plaintiffs' Memorandum at 11 n. 9, is inappropriate. In that case, the Supreme Court noted in passing that in ruling for the plaintiffs on the merits the court below necessarily had made an implicit judgment that the plaintiffs' claims were justiciable. Bandemer, 478 U.S. at 118. In the instant case, this court ruled against the plaintiffs on a motion for preliminary relief. The court does not perceive that such a ruling can be construed into a holding in plaintiffs' favor on a hotly contested and potentially dispositive issue.

> ous pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

Baker held that none of these characteristics were present in an action challenging a state legislative apportionment on the basis of disparities in the number of voters represented by each legislator, id. at 226, and the Court subsequently formulated the one person/one vote standard to govern similar actions. See Reynolds v. Sims, 377 U.S. 533 (1964). At almost the same time, however, the Court was unanimous in taking summary action amounting to a rejection of the argument that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment. WMCA, Inc. v. Lomenzo, 382 U.S. 4, 6 (1965) (Harlan, J., concurring). The Court and most commentators agreed that it would be impossible to adjudicate equal protection challenges to political gerrymanders "without being forced to make a nonjudicial policy determination or to resort to a standard that is not judicially manageable." Davis v. Bandemer, 478 U.S. 109, 148 (1986) (O'Connor, J., concurring).

In Bandemer, however, the Supreme Court held that a gerrymandering suit brought by Indiana Democrats against Republican State officials did present a justiciable question of law. In Bandemer, the plaintiffs alleged that the Republican-controlled Indiana legislature had redrawn the state legislative districts in 1981 for the purpose and with the effect of minimizing or cancelling out the voting strength of an identifiable political minority, Democratic voters. Davis v. Bandemer, 603 F. Supp. 1479, 1482, 1490 (S.D. Ind. 1984),

rev'd, 478 U.S. 109 (1986). The techniques the district court found the Republican majority had employed purposefully to achieve this result were those familiar from racial gerrymandering cases -- irregularly shaped district boundaries obviously drawn with political demographics in mind, disregard for traditional boundaries, and a "peculiar mix of single-member and multimember districts." 478 U.S. at 116.

Plaintiffs, in candidly describing their attack on North Carolina's mode of electing Superior Court judges as a challenge to the election system's "fairness," Plaintiffs' Memorandum at 7, attempt to avoid the political question bar on judicial resolution of such challenges[8] by relying on an expansive and, in this court's view, incorrect reading of Davis v. Bandemer. Plaintiffs treat Bandemer as if it were a blanket repudiation of the political question doctrine in the area of state electoral systems. See, e.g., Plaintiffs' Memorandum at 7 (Bandemer "has now removed the political question bar [on] a challenge" to the fairness of state's mode of electing Superior Court judges).

However, the court believes that, for the purposes of the political question doctrine, the only difference between Bandemer and a (clearly justiciable) racial gerrymandering case was the fact that in Bandemer it was a group defined by political affiliation rather than by race that was alleging

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[8] The courts repeatedly have found that challenges to a statute's "fairness" are not actionable. See, e.g., Holshouser v. Scott, 335 F. Supp. at 933-34 ("We have no authority to pass upon the fairness of the election of Superior Court Judges in North Carolina. That is a political question to be resolved by the people and the legislature. We can only determine the constitutional validity of the statutes involved.").

invidious discrimination. The Bandemer Court's holding was, simply, that this difference alone did not convert a claim courts can adjudicate into one they cannot: "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." Bandemer, 478 U.S. at 125. Bandemer marks a significant development in the law of political questions and equal protection, but it is a development, not a radical reshaping. Bandemer did not hold that all complaints about political influence on the electoral process are legally cognizable, but only "decline[d] to hold that such claims are never justiciable" Id. at 124. The Bandemer Court reasoned that an allegation of political gerrymandering that tracks precisely "the racial gerrymandering claims that we have consistently adjudicated" could be decided using judicially manageable standards similar to those employed in the race area, id. at 125, and raised the same legal concerns about "fair and adequate representation" recognized in the one person/one vote cases. Id. at 126 n. 9.

In addition, Bandemer did not hold that claims of political gerrymandering are subject to the same legal standards employed in other cases; indeed, the Justices who believed Bandemer justiciable divided sharply on the proper standard. Id. at 185 n. 25 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part) ("there is no 'Court' for a standard" for determining the merits). A four-justice plurality found that the Bandemer plaintiffs had failed to allege or demonstrate "a history of disproportionate results . . . in conjunction with strong indicia of lack of political power and the denial of fair representation." Id. at 139

(opinion of White, J.).[9] The plurality would require such a "threshold showing of discriminatory vote dilution . . . for a prima facie case of an equal protection violation" as well as a credible allegation of discriminatory intent. Id. at 143, 129 n. 11. Two justices would impose a "heavy burden of proof," requiring demonstration of a different set of factors and, under their standard, would have upheld the Bandemer plaintiffs' claim on the merits. Id. at 185 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part).

Despite their disagreements, however, the plurality and Justices Powell and Stevens agreed on a number of essential points. Most importantly, these six justices found that it was crucial to the justiciability of the Bandemer complaint that it presented colorable allegations that the State of Indiana was denying the plaintiffs "fair and adequate representation" in the state's political process as a whole. Id. at 126 n. 9, 131-133, and at 162 (Powell, J., concurring in part and dissenting in part). In Bandemer, "the issue [was] one of representation," id. at 124, and as such presented a justiciable claim.

The plurality and Justices Powell and Stevens agreed, furthermore, that the Equal Protection Clause does not guarantee electoral success or forbid states to include political considerations in structuring their political processes. The "mere fact that a particular apportionment scheme makes it more difficult for a particular group" to win elections, "does not render that scheme constitutionally infirm," id. at 131. As Justices Powell and Stevens put it,

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[9] All page cites hereinafter to Davis v. Bandemer are to Justice White's plurality opinion except as otherwise noted.

the "common practice of the party in power to choose the redistricting plan that gives it an advantage" is not, in and of itself, the type of unconstitutional gerrymandering Bandemer renders suspect. Id. at 164-65 (Powell, J., concurring in part and dissenting in part).

The plaintiffs' efforts in the present action to satisfy Bandemer's justiciability requirements fall short. Bandemer involved the claim that a legislative majority was wielding its governmental power "to minimize or cancel out the voting strength of . . . political elements of the voting population," id. at 119 (citation omitted), thereby insulating itself from the need to accord the minority fair representation. It was the danger of a "lack of responsiveness by those elected to the concerns" of those they represent that justified judicial scrutiny of the state legislative redistricting scheme. Id. at 131-34. Accord id. at 169-70 (Powell, J., concurring in part and dissenting in part). Bandemer thus rests on the constitutional obligation of representative officials to represent all of their constituents, regardless of those constituents' racial or political affiliations. Because representative officials ought to take political considerations and constituents' views into account when they act, an electoral scheme that insulates them from those views raises justiciable questions of constitutional magnitude. See id. at 125 n.9.

In North Carolina, state senators and representatives hold clearly political offices. Today, both are directly elected by the citizens of North Carolina, and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues. The executive branch of the State government, headed by its highest officer elected at large within the

state, is also expected to bring the views and opinions which he offered the State electorate in seeking the Governorship to bear on the job of running the State machinery. A gerrymandered electoral scheme that insulates these representatives from political segments of the electorate would appear to be actionable under Davis v. Bandemer.

In the present case, in contrast, the plaintiffs' Complaint is with the State's mode of electing judges, the quintessentially non-representative governmental officials. Judges are not legally obligated to act in a politically responsive manner or to make decisions in accordance with the views of a constituency; indeed, the judicial obligation is to implement an impartial determination of the facts and application of the law to a case or controversy without regard to majority viewpoint or popular opinion. Such obligation is the very predicate of judicial integrity, and is frequently fulfilled to protect and enforce the constitutional rights of minorities. A departure from these principles is not to be lightly regarded. As the Supreme Court has observed, "[i]t is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." Clements v. Fashing, 457 U.S. at 968 (plurality).

The Supreme Court rejected the idea that judges are representative officials for constitutional purposes in Wells v. Edwards, 409 U.S. 1095 (1973). Wells involved a one person/one vote challenge to Louisiana's method of electing judges. A three-judge district court dismissed the complaint, holding that

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature , is not the organ responsible for achieving representative government."

Wells v. Edwards, 347 F. Supp. 453, 455-56 (M.D. La. 1972) (quoting New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967), aff'd mem., 409 U.S. 1095 (1973)). The Supreme Court summarily affirmed the district court's decision.[10] As the Fifth Circuit recently observed:

> It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming Wells, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other

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[10] The Supreme Court has made it clear that lower courts are not "free to disregard . . . [v]otes to affirm summarily . . . [;] [these votes], it hardly needs comment, are votes on the merits of a case. . . . '[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'" Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (citations omitted).

> opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n. 2, 93 S.Ct. 904, 905 n. 2.

Latin American Citizens Council # 4434 v. Clements, 914 F.2d 620, 627 (5th Cir. 1990) (en banc), cert. granted, ___ U.S. ___, 111 S.Ct. 775 (1991). The Fifth Circuit concluded that in Wells the Supreme Court "necessarily" held that "for purposes of the Equal Protection Clause of the Fourteenth Amendment judges 'do not represent people.'" Id. Wells, furthermore, was not an isolated decision. The courts that have addressed the issue of whether judges are representative officials for constitutional purposes unanimously have agreed that "judges do not 'represent' those who elect them." Clements, 914 F.2d at 626 n. 9 (collecting cases). The most recent judicial discussion of this issue is that of the en banc Fifth Circuit opinion in Clements.[11]

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[11] In their Memorandum, plaintiffs make much of the fact that the Supreme Court has granted certiorari to resolve the disagreement between Clements and Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988), on the applicability of Section 2 of the Voting Rights Act to judicial elections (specifically, whether the term "representative" as used in Section 2 applies to judges). Plaintiffs' Memorandum at 13-15. Plaintiffs appear to have misread the defendants' reason for citing Clements, which was for its reading of Wells. Clements and Mallory both were decided on the basis of the Voting Rights Act, not the Equal Protection Clause, and thus their disagreement and its eventual resolution by the Supreme Court are not germane to the present case. The court does not perceive that Mallory supports plaintiff's constitutional claim. See Mallory, 839 F.2d at 278 ("The plaintiffs' section 2 claim involves the construction of an Act of Congress, a different task from construing and applying a provision of the Constitution.") and at 277 (the 1982 amendments to the

(continued...)

Excluding elected state judges from the scope of constitutional rules designed to insure "the objective of fair and adequate representation," Bandemer, 478 U.S. at 125 n. 9, is wholly consistent with established equal protection principles. Rules, such as the one person/one vote requirement and Bandemer's prohibition of some partisan gerrymanders, prevent representative officials, such as legislators, from sheltering themselves against popular influence and pressure.

But American judicial systems are structured for the very purpose of insulating the judiciary from political influence and popular pressure. The United States Constitution, of course, provides for the appointment of federal judges and guarantees their salaries and their tenure during good behavior. The same concern to protect judges from ordinary politics is present in North Carolina law. The State Constitution affords Superior Court judges long terms of office, N.C. Const. art. IV, § 16 (eight years), requires special procedures for their removal from office, id. at § 17, guarantees their salaries against reduction, id. at § 21, and prohibits legislative interference with the rightful jurisdiction of the courts, id. at § 1. The Code of Judicial Ethics forbids

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[11](...continued)
Voting Rights Act were intended to eliminate from the Act the intent requirement of an action brought under the Equal Protection Clause).

In this regard, the court notes that although its ultimate holding in this section of the instant order is that, since judges are not representatives for constitutional purposes, a claim of partisan gerrymandering of judicial elections is not logically justiciable, the court expresses no opinion as to whether a claim of racial vote dilution in the election of judges is actionable under Section 2 of the Voting Rights Act.

candidates for judicial office from engaging in the constituent-oriented campaigning that those seeking representative offices typically -- and appropriately -- undertake. Superior Court judges in North Carolina, in short, are not representative officials, and the concern of Davis v. Bandemer that representative officials be representative simply does not apply to them.

If judges are not representatives for Fourteenth Amendment one person/one vote purposes, as Wells held, it is clear that the same conclusion holds in the present context. Davis v. Bandemer recognized the justiciability of certain challenges to the method by which a State structures its legislature, the representative element of its government. It did not authorize wholesale judicial intervention into "the manner in which a State has decided to govern itself," Clements v. Fashing, 457 U.S. at 972, or, in particular, into the form of a non-representative branch of state government.

An examination of the plaintiffs' arguments in this case reveals how remote their allegations are from the concerns the Supreme Court addressed in Davis v. Bandemer. Plaintiffs do not allege any "lack of responsiveness" on the part of North Carolina Superior Court judges. See Plaintiffs' Memorandum at 15 ("Candidly, the plaintiffs make no representation that [democratic] judges are not 'responsive.'"). Indeed, they acknowledge that "in the administration of justice, Republican judges may perform similarly to Democratic judges in similar cases under like circumstances." Plaintiffs' Answers to Defendants' Fourth Set of Interrogatories, Ans. # 11. Nothing in the plaintiffs' presentation of their case to date even suggests that North Carolina's method of electing Superior Court judges has led

those judges to act unfairly or arbitrarily toward plaintiffs, or toward Republican voters in general. Bandemer was an attack on the use of state legislative power by the state legislative majority, allegedly to serve the majority's selfish interests. By definition, nothing in plaintiffs' case raises the possibility that partisan political decisionmakers have taken action to exempt themselves from their constitutional duties toward any political segment of the State citizenry.

For the reasons discussed supra, the court does not perceive that the rationale of Bandemer applies to this case. Plaintiff's Complaint seeks this court's intervention not in order to protect any constitutional right recognized by the Supreme Court's decisions, but in order to restructure the manner in which a state has chosen to elect a non-representative branch of government. Under Baker v. Carr and Davis v. Bandemer this is a non-justiciable political question, and, accordingly, plaintiffs' Complaint is dismissed.[12]

CONCLUSION

For the reasons discussed supra, the court GRANTS defendants' Motion to Dismiss this action, pursuant to Rule 12(b)(6), Fed. R. Civ. P., and hereby DISMISSES this action.

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[12] The court's ruling is not, of course, a stamp of approval on the election system's wisdom or fairness." In this regard, the words of the Holshouser district court bear repeating: "We have no authority to pass upon the fairness of the election of Superior Court Judges in North Carolina. That is a political question to be resolved by the people and the legislature. We can only determine the constitutional validity of the statutes involved." 335 F. Supp. at 933-34.

DISTRICT COURT ORDER OF JUNE 6, 1991 CONTINUED . . .

SO ORDERED.

This 6th day of June, 1991.

s/James C. Fox
JAMES C. FOX
United States District Judge

DISTRICT COURT ORDER OF JULY 29, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
No. 88-263-CIV-5-F

REPUBLICAN PARTY OF NORTH CAROLINA, et al., Plaintiffs,	)	
v.	)	ORDER
JAMES G. MARTIN, Governor of North Carolina, et al., Defendants,	)	
and	)	
NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, Defendant-Intervenor.	)	

This matter is now before the court on plaintiffs' Motion for Relief from Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which asks this court to reconsider its June 7, 1991, Order (the "Order"), which dismissed the plaintiffs' Complaint in its entirety. Defendants and defendant-intervenor have filed memoranda in opposition to said Motion, and plaintiffs have filed a Reply Brief; accordingly, the Motion is now ripe for disposition.

The only argument which plaintiffs advance in support of their Motion is the claim that two decisions of the

United States Supreme Court, decided two weeks after the filing of the Order, undercut the reasoning contained in the same. In Chisom v. Roemer, ___ U.S. ___, 59 U.S.L.W. 4696 (June 20, 1991), the Supreme Court held that the "results test" of § 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, applies to the election of state supreme court justices, based on an interpretation of the word "representatives," as contained in the 1982 amendment. Houston Lawyers' Assoc. v. Attorney General of Texas, ___ U.S. ___, 69 U.S.L.W. 4706 (June 20, 1991), extended that holding to elections of state trial judges. Plaintiffs assert that these two holdings are somehow broad enough to undermine this court's Order which found that plaintiff's Fourteenth Amendment Equal Protection gerrymandering claim, which challenged North Carolina's method of electing judges on grounds of partisan unfairness, is not justiciable. For the reasons that follow, the court does not perceive that a ruling that a method of judicial election may be the subject of attack under § 2 also implies that the same method may be the subject of a vote dilution challenge under the Equal Protection Clause.[1]

In its Order, the court explicitly rejected an earlier version of plaintiffs' argument that decisions construing § 2 are somehow applicable to plaintiffs' Fourteenth Amendment gerrymandering claim. The court, noting that "plaintiffs make much of the fact that the Supreme Court has granted

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[1] The court notes that, if indeed these two Supreme Court decisions did have any relevance to the plaintiffs' claims, it would be only to the plaintiffs' Fourteenth Amendment Equal Protection gerrymandering claim; the two decisions would not affect plaintiffs' other federal and state claims, which were also dismissed in the court's Order.

certiorari to resolve the disagreement" in the courts of appeals over the scope of the results test, stated that "Clements and Mallory [the conflicting appeals court decisions] both were decided on the basis of the Voting Rights Act, not the Equal Protection Clause, and thus their disagreement and its eventual resolution by the Supreme Court are not germane to the present case." Order at 31 n. 11. Plaintiffs' present motion simply repeats, without significant amplification or modification, the claim that resolution by the Supreme Court of an issue of statutory construction should determine the constitutional issue raised herein -- the justiciability of the plaintiffs' Complaint. As this court already has stated, that resolution is not germane to the present case.

The Supreme Court's opinion in Chisom confirms this court's rejection of the plaintiffs' argument. In Chisom, the Supreme Court began its legal analysis with a careful description of its holding:

> Our decision today is limited in character, and thus, it is useful to begin by identifying matters that are not in dispute. No constitutional claims are before us. Unlike Wells v. Edwards, White v. Regester, and Mobile v. Bolden, this case presents us solely with a question of statutory construction. That question involves only the scope of the coverage of § 2 of the Voting Rights Act as amended in 1982. . . .
>
> . . . The only matter in dispute is whether the test for determining the legality of

> such a practice, which was added to the statute in 1982, applies in judicial elections as well as in other elections.

Chisom, 59 U.S.L.W. at 4698 (emphases added and footnotes omitted).[2] As defendants state in their Memorandum in Opposition to Plaintiffs' Motion for Relief from Judgment, "[i]t is difficult to imagine a more emphatic statement about the limitations of a holding, limitations that the plaintiffs now ask this Court to disregard." Defendants' Memorandum at 3.

The plaintiffs' argument for having this court disregard the Supreme Court's explicit limitations on its holdings in Chisom and Houston Lawyers, Assoc. consists of the bare-bones assertion that "the Supreme Court's reasoning is applicable to the plaintiffs' claims under the First and Fourteenth Amendments in the instant case." Plaintiffs' Memorandum in Support of Motion to Extend Time for Filing Notice of Appeal and Motion for Relief from Judgment Pursuant to Rule 60(b) at 2. See also id. at 3 (stating that the "concept" of "representative" is "no different for the Fifteenth Amendment and the Voting Rights Act than for the First and Fourteenth Amendments"). The court finds plaintiffs' assertion to be unwarranted.

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[2] The Supreme Court's opinion in Houston Lawyers, Assoc. relies on Chisom's discussion of the main issue and simply notes that "[w]e granted certiorari in these cases, . . . and in Chisom v. Roemer, . . . for the limited purpose of considering the scope of the coverage of § 2." Houston Lawyers' Assoc., 59 U.S.L.W. at 4704 (emphasis added and citations omitted).

DISTRICT COURT ORDER OF JULY 29, 1991 CONTINUED . . .

The question presented in the Chisom and Houston Lawyers' Assoc. cases was whether the 1982 amendment of § 2 of the Voting Rights Act extends to state judicial elections. Prior to 1982, it was clear that § 2 did apply to such elections. Chisom, 59 U.S.L.W. at 4698. Congress enacted the 1982 amendment in response to Mobile v. Bolden, 446 U.S. 55 (1980), which had held that § 2 was coextensive with the Fifteenth Amendment, and that as a consequence a plaintiff must prove discriminatory intent in order to state a § 2 claim, just as with a constitutional claim. The 1982 amendment eliminated the need to prove discriminatory intent, and substituted a results test for identifying violations of § 2. Chisom, 59 U.S.L.W. at 4699. In Chisom, the Supreme Court rejected as "anomalous" the argument that "Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection." Id. at 4702.

Chisom and Houston Lawyers' Assoc. thus resolved an important but discrete question of statutory construction -- what was the intent of the Congress that enacted the 1982 amendment to § 2?[3] The present case involves neither the

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[3] The specific elements of the Supreme Court's analysis in Chisom reflect the purely statutory nature of its holding: the Court emphasized that neither the 1982 text nor its legislative history indicated an intent to withdraw § 2 coverage from judicial elections; that the lower court's decision holding the results test inapplicable to judicial elections resulted in "radical surgery" on the statutory text; that the purposes of the 1982 amendment make it "appropriate for § 2 . . . to continue to apply . . . to judicial elections;" and that the contrary conclusion would produce an "anomalous result" that the 1982 Congress was "unlikely to have intended

(continued...)

intent of Congress nor the application of the tools of statutory construction. This court's Order, instead, required the resolution of a constitutional question, through the application of the principles defining non-justiciable political questions.

The court perceives plaintiffs' assumption that § 2's statutory requirements must be identical to federal constitutional requirements to be unwarranted. The very purpose of the 1982 amendment to § 2 was to differentiate the Voting Rights Act's standards from those of the Constitution. See Chisom, 59 U.S.L.W. at 4702 (the "statute was enacted to protect voting rights . . . not adequately protected by the Constitution itself"). The issue of § 2 coverage that Chisom and Houston Lawyers' Assoc. decided goes to the range of situations in which Congress intended courts to apply a particular substantive test of liability; the question of justiciability concerns the type of questions the Constitution permits courts to resolve. These issues are not properly equated.

The plaintiffs have also misread the implications of Chisom and Houston Lawyers' Assoc. for the instant case.[4]

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[3](...continued)
since the Supreme Court had already held § 5 of the Voting Rights Act applicable to judicial elections. 59 U.S.L.W. 4700-01. This reasoning, directed as it is toward construing congressional intent, is clearly irrelevant to the constitutional question before this court.

[4] The plaintiffs state that "[t]hese cases do not merely hold that the Voting Rights Act applies to the election of judges; each case concluded that elected judges are not to be subject to disparate treatment compared to other elected officials." Plaintiffs' Memorandum at 4-5. This (continued...)

Rather than undermining this court's reasoning in its Order, Chisom reaffirms at least one important aspect of that reasoning. In the Order, this court relied in part on Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd summarily, 409 U.S. 1095 (1973), which held that the one-person, one-vote rule was inapplicable to the election of judges. In Chisom, the Supreme Court explicitly distinguished Wells, not by "repudiat[ing]" its reasoning, as plaintiffs suggest[5], but by stressing the difference between an equal protection claim and a Voting Rights Act claim. Chisom, 59 U.S.L.W. at 4702 ("Wells rejected a constitutional challenge based on the Equal Protection Clause of the Fourteenth Amendment." It has no more relevance to a

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[4](...continued)
statement directly contradicts the Supreme Court's own description of the issue it resolved in Chisom and Houston Lawyers' Assoc., as quoted above. See Chisom, 59 U.S.L.W. at 4698 ("The only matter in dispute" is whether the § 2 results test applies to judicial elections).

[5] Indeed, in describing Wells, the Supreme Court stated that "we have held the one-person, one-vote rule inapplicable to judicial elections," Chisom, 59 U.S.L.W. at 4702 (emphasis added), thus laying to rest any doubts about the authority of Wells stemming from the fact that Wells was a summary affirmance. Inexplicably, plaintiffs repeat their earlier assertion, that the defendants' argument -- and now by implication this Court's Order -- somehow depend on League of United Latin American Citizens Council # 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), rev'd, Houston Lawyers' Assoc. v. Attorney General of Texas, ___ U.S. ___ 69 U.S.L.W. 4706 (June 20, 1991), rather than on Wells. As this court observed in its Order, "[plaintiffs appear to have misread the defendants' reason for citing Clements, which was for its reading of Wells," Order at 31 n. 11 (which reading the Supreme Court agreed with in Chisom), not for its interpretation of whether or not judges are "representatives" covered by § 2.

correct interpretation of this statute than does our decision in Mobile v. Bolden, . . . which also rejected a constitutional claim."). Thus, the Court recognized that the Equal Protection Clause and the Voting Rights Act are not co-extensive and that the interpretation of the scope of one has no relevance when determining the scope of the other.

In short, the Supreme Court in Chisom and Houston Lawyers' Assoc., rather than enunciating broad principles of constitutional law, as plaintiffs suggest, confined itself to the narrow question of the interpretation of a statutory term. Thus, the court believes that its reasoning in its Order remains dispositive in interpreting plaintiffs' Fourteenth Amendment Equal Protection claim. It is the lack of responsiveness by those elected to the concerns of those they represent that justifies judicial scrutiny of elections of legislative and executive officials. In contrast, judges are not supposed to be responsive and, in that sense, cannot be said to be "representatives" for purposes of equal protection clause analysis. See, e.g., Order at 28-29. For these reasons, the Chisom and Houston Lawyers' Assoc. decisions do not warrant setting aside the judgment of dismissal entered in this action. Accordingly, plaintiffs' Motion for Relief from Judgment is hereby DENIED.[6]

SO ORDERED.

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[6] Plaintiffs' Motion for Hearing on their Motion for Relief from Judgment is also DENIED.

DISTRICT COURT ORDER OF JULY 29, 1991 CONTINUED . . .

This 29th day of July, 1991.

s/James C. Fox
JAMES C. FOX
United States District Judge

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ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

FILED: April 27, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-1741
(CA-88-263-5-F)

REPUBLICAN PARTY OF NORTH CAROLINA; BRUCE BRIGGS; WILLIAM R. SIGMON; MARVIN K. GRAY; R. HOWARD RIDDLE; LLOYD FOWLER; JOE R. WILSON; R. WALTER WHITE; EDGAR A. READLING, JR.; FREDERIC M. GALLAGHER; RALPH A. WALKER,

Plaintiffs-Appellants,

versus

JAMES B. HUNT, JR., Governor of North Carolina; NORTH CAROLINA STATE BOARD OF ELECTIONS; WILLIAM MARSH, JR., Chairman of North Carolina State Board of Elections; GREG O. ALLEN; M. H. HOOD ELLIS; RUTH TURNER SEMASHKO; JUNE K.

YOUNGBLOOD; NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS,

Defendants-Appellees,

and

DURHAM COUNTY BOARD OF ELECTIONS; FORSYTH COUNTY BOARD OF ELECTIONS; GUILFORD COUNTY BOARD OF ELECTIONS,

Defendants.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellees have filed a petition for rehearing with suggestion for rehearing in banc and appellants filed an answer to the petition. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Widener, Phillips and Murnaghan voted to rehear the case in banc and Judge Phillips wrote the attached dissent. Judges Russell, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig and Williams voted against rehearing in banc. Chief Judge Ervin disqualified himself from participation.

The original judicial panel voted to deny the petition for rehearing.

ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC CONTINUED . . .

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Wilkins for a panel consisting of Judge Russell, Judge Wilkins and Judge Glen M. Williams, Senior United States District Judge, sitting by designation.

For the Court

/s/Bert M. Montague
Clerk

ORDER AND DISSENT – PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC CONTINUED . . .

PHILLIPS, Circuit Judge, dissenting from denial of rehearing en banc:

In 1986, a severely divided Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986) opened a narrow door of justiciability for claims by political parties (and possibly their cross-over allies) that their group voting power had been unconstitutionally degraded by partisan political gerrymandering of legislative districts and, having opened that outer door but narrowly, opened an even narrower door for the prima facie statement and proof of such a particularized claim. Significantly, the claim initially found justiciable by a six to three majority of the Bandemer Court was then thought by four of those who had thought it justiciable (and three who disagreed on that point) not, however, proven prima facie under the more stringent substantive sufficiency test. Though discriminatory intent by the state legislature was so palpable as not to be seriously questioned, see id. at 127, 140-41 and though there was considerable evidence of adverse effect from the gerrymander upon the challenging political party's proportionate success at the polls, see id. at 134, it was not sufficient in degree to establish an equal protection violation under the Court's demanding test. See id. at 134-143.

A common theme runs through each of the three different viewpoints expressed in the four separate Bandemer opinions. Concerns of federalism and separation of powers mandate that, if they are to exist at all, the occasions for federal court consideration of claims of partisan political gerrymandering by state legislatures must be strictly confined. See id. at 129-134, 143 & n.14, (plurality opinion) (though such claims justiciable, stringent prima facie claim

test required in view of "peculiar characteristics of these political gerrymandering claims" and "the delicacy of intruding on this most political of legislative functions"); id. at 144 (Burger, J., concurring in judgment) (not justiciable; claims of "injustice" from political gerrymandering do not "belong" with federal judiciary); id. at 144 (O'Connor, J., concurring in judgment) (same; "judiciary should leave [such claims] to the legislative branch"); id. at 184-85 (Powell, J., dissenting) (though claims justiciable in general and instant one proven, difficulties of adjudicating such claims by "federal judges . . . ill-equipped generally to review legislative [districting] decisions" requires that courts "impose a heavy burden of proof" on parties making such claims).

Since Bandemer was decided in 1986 until now, neither the Supreme Court nor, I believe, any other lower federal court than ours had opened wider the narrow doors of justiciability and substantive claim defined by the Bandemer Court until the panel decision in this case. That decision has now opened both wider in ways that I believe are unwarranted under controlling Supreme Court authority. Unless corrected, the decision will work great constitutional mischief of exactly the sort recognized by every Justice who wrote in Bandemer as the special threat to federalism and separation of powers posed by this particular type of attack on state legislative functions.

I think we should do the correcting, and do it now. If we do not, and unless the Supreme Court were to undertake review of our judgment of reversal and remand at this time, the result will be to send this case back to the district court under a mandate which, with all respect, I believe is

unmanageable--precisely because it is unmoored from even the concededly uncertain moorings of Bandemer. See id. at 185 n.25 (Powell, J., dissenting) (pointing out that because of the division of views within the court "there is no 'Court' for a standard that should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander"). In consequence, later correction, whether by this Court of the Supreme Court, will have been at the expense of a great deal of essentially unguided effort by both court and parties, one of them a sovereign state, (and possibly by that state's legislature) in a real political thicket which the district court wisely had seen was one into which it should not go. For this reason, I dissent from the court's decision not to rehear en banc the appeal in this case.

I

The first and fundamental error in our panel's decision is its reading of Bandemer's narrow justiciability holding to include claims respecting the election of state judges. I believe that, properly read, Bandemer confines the justiciability of claims of partisan political gerrymandering to those involving the election of legislative officials. While Bandemer does not expressly say so (having no need to) all the pointers on which we commonly rely are in that direction.

The prime pointer is found in the Supreme Court's only direct consideration of a constitutional voting rights claim related to the election of judges. In Wells v. Edwards, 409 U.S. 1095 (1973) the Court summarily affirmed a three-judge district court decision that the claim, there of one-

person, one-vote violation, was not a justiciable one. While such a summary affirmance does not of course foreclose later, full consideration of the dispositive issue by the Supreme Court, Bandemer, 478 U.S. at 121, the decision affirmed and its rationale are binding on this court until that happens. It has not yet. Indeed, the continued authority of Wells recently has been expressly recognized by the Supreme Court in Chisom v. Roemer, 111 S.Ct. 2354, 2368 (1991).

It therefore is presently the law of the land, hence of this circuit, that because state judges, where elected, are not elected to provide the people with "representative government," a claim that the process by which they are elected violates the constitutional one-person, one-vote principle is not a justiciable one--that principle simply being "not relevant to the makeup of the judiciary." Wells, 347 F. Supp. 453, 455-56 (M.D.La. 1972), aff'd mem., 409 U.S. 1095 (1973). I believe that Wells' rationale for the nonjusticiability of one-person, one-vote claims respecting judicial elections necessarily extends as well to the nonjusticiability of group vote-dilution claims respecting such elections. I do not see how, if having one's individual vote in judicial elections denied equal weight to that of all others in the voting constituency is not the subject of a justiciable constitutional claim, having an identifiable political group's voting power in such elections "diluted" by partisan political gerrymandering could be. The one is no more nor less relevant to "preserv[ing] a truly representative government" under the Wells rationale.

I therefore read Wells as holding directly, and by necessary implication from the rationale of the lower court

decision it affirmed, that no constitutional challenge to a state's districting decisions respecting the election of its judges could present a justiciable controversy, whether based on one-person, one-vote or on group vote-dilution grounds.

Bandemer's later holding that equal protection challenges by political parties to state districting decisions respecting the election of legislators do present justiciable controversies does not undercut this reading of Wells. It would do so only if the necessary implication of its justiciability holding was that it embraced judicial as well as legislative elections. I believe the plurality and concurring opinions on which the Bandemer holding is based instead imply the opposite: that it is limited by its rationale, by its tone, and by the precedent upon which it relies, to claims respecting legislative elections.

The Bandemer holding, an extremely cautious one on any reading, is expressly grounded in a late-developed constitutional voting rights jurisprudence that was solely concerned with the unique threat posed to truly representative government by state apportionment and districting decisions affecting the make-up of the very legislative bodies that are the indispensable core of that form of government and the ultimate instrument through which minority groups may effectively "fend [] for themselves" in the political processes of a state. Bandemer, 478 U.S. at 152 (O'Connor, J., concurring in the judgment). It is inconceivable to me that the one-person, one-vote principles of Baker v. Carr, 369 U.S. 186 (1962) and Reynolds v. Sims, 377 U.S. 533 (1964), or even the racial group vote dilution principles of White v. Regester, 412 U.S. 755 (1973) and Whitcomb v.

Chavis, 403 U.S. 124 (1971) would ever have originated in response to constitutional challenges respecting the makeup of state judiciaries. Wells of course is direct evidence that they would not have, and Bandemer's rationale, directly drawn from those seminal voting rights decisions, see Bandemer, 478 U.S. at 118-27, confirms that its holding too is totally dependent upon the fact that there too it was the make-up of legislative bodies, hence of legislative power, that was at stake. The whole tone of the Bandemer plurality opinion (and of the concurring opinion providing the justiciability holding) is one of great caution and anxiety about extending federal judicial oversight of the apportionment/districting functions of state legislatures past the few points of absolutely felt necessity--all concerned with the composition of legislative bodies--that had now been identified in Baker, White, and Bandemer. I believe it is implicit in Bandemer that it would not have been written in response to a partisan political gerrymandering challenge to a state's process for electing its judiciary.

Chisom, in which the Court recently held that amended § 2 of the Voting Rights Act did "cover" judicial elections, does not undercut this reading of Wells and Bandemer. Our panel's decision relies upon Chisom as demonstrating on the one hand that Bandemer's justiciability holding respecting legislative elections extends as well to judicial elections, see slip op. p.15, n.17, and, on the other, that Wells' nonjusticiability holding respecting judicial elections is confined to one-person, one-vote challenges, see slip op. p.17. But this reliance is, with respect, simply misplaced. Both suggestions are directly refuted or necessarily belied by the Chisom opinion itself.

As to the suggestion that Chisom's discussion of § 2 "coverage" of judicial elections "applies to claims pursued under the Equal Protection Clause," slip op. 14 n.17, the Chisom Court was at pains to disclaim any relevance of its analysis of the concededly broader reach of § 2's coverage to the reach ("justiciability") of related constitutional voting rights protections. Chisom, 111 S.Ct. at 2361, 2368.

The panel's suggestion that Chisom's recognition of Wells' continued authority on the nonjusticiability of challenges to judicial elections was confined to one-person, one-vote challenges is belied by the Chisom Court's discussion of the point. That aspect of Wells was addressed in Chisom only in response to the state-defendants' suggestion that because Wells had found one-person, one-vote claims respecting judicial elections nonjusticiable, this precluded § 2 coverage of such elections, since consideration of § 2 vote-dilution claims required an initial determination whether one-person, one-vote principles had been observed in the challenged districting plans. See Chisom, 111 S.Ct. at 2368. The Chisom Court rejected the argument by pointing out that § 2 claims of racial vote dilution could be made out irrespective of the observance of one-person, one-vote requirements. Id. n.32. This of course says nothing about the breadth of Wells' nonjusticiability holding, but simply points out the irrelevance of that holding to questions of § 2's "coverage".

A proper parsing of the Supreme Court decisions in Wells, Bandemer, and Chisom thus clearly points to the nonjusticiability of any claim by a political party that a state's districting design for election of its judges, as opposed to its legislators, violates any constitutionally secured group

voting right of the party. The only group voting rights recognized to date by the Supreme Court as entitled to constitutional protection against dilution by a state's electoral districting design--hence as potential subjects of justiciable controversies--are those of identifiable racial and political groups respecting the election of legislators. At this point, this defines the limit of constitutionally secured group voting rights, hence of justiciable constitutional claims by racial or political groups of voters. To the extent state districting designs for the election of other officials may be thought to result in unfairness or injustice to identifiable racial or political (or other?) groups of voters, rectification has been left by the Supreme Court's voting rights jurisprudence to the political processes of the states (subject always of course to Congress' constitutional enforcement powers in respect of racial groups).

Even if Bandemer's justiciability holding were construed to extend to claims respecting the election of judges, the claim here would not meet the most critical aspects of Bandemer's justiciability test: that the claim be subject to resolution by the application of "judicially discernible and manageable standards" and that its resolution not require the making of an "initial policy decision that the judiciary should not make." Bandemer, 478 U.S. at 123, 125. The Bandemer majority concluded that the partisan political gerrymandering claim there in issue could be resolved under the equal protection standards developed and applied in the one-person, one-vote and racial vote-dilution cases, id. at 123-25 and, seemingly, that the only "initial policy decisions" required to resolve the claim were ones ensuring fair representation" for identifiable groups of voters

which were not decisions "of a kind clearly for nonjudicial discretion." Id. at 125-26 & n.9. Disagreeing on this critical point, three Justices thought that racial vote-dilution standards could not properly be applied to political party claims, that nonjudicial policy determinations would be required to resolve political gerrymandering controversies. Id. at 155-161 (O'Connor, J., concurring in judgment).

Of course the Bandemer majority holding on this issue controls but, with respect, I believe that every judicial management difficulty pointed out by Justice O'Connor's concurring opinion that would result from the attempt to transpose racial vote-dilution standards to political group vote-dilution cases would be magnified past the acceptable point where, as here, the transposition would also be from claims respecting legislative districting to claims respecting judicial elections. And indeed I do not believe that the transposition could be made to the particular context of this case--North Carolina's electoral process for election of its superior court judges--without making an "initial policy decision" about the structural design of the state's judicial system that clearly is one "not for the federal judiciary to make." My reasons are as follows.

A unique, critical feature of contemporary group vote-dilution jurisprudence (the source, per Bandemer, of whatever standards would be available in this case) is that the existence of a dilution-by-districting (or failure-to-district) violation can only be determined by identifying electoral districts which would not violate the group's voting rights because in those district they would constitute effective voting majorities. A state's failure so to have districted thus

constitutes the violation, and the appropriate remedy is a requirement that it now do so. In this somewhat unusual decisional process, the availability of remedy thus effectively determines the existence of right--and its violation. See Growe v. Emison, ___ U.S. ___, ___ 61 U.S.L.W. 4163, 4168 (U.S. Feb. 23, 1993); Thornburg v. Gingles, 478 U.S. 30, 50 n.17 (1986). Critical to this process for resolving vote-dilution claims, therefore, is a court's ability to determine with sufficient precision two things: the identity of the group claiming violation of its rights--so that its numbers, hence its potential voting strength, can be determined; and the appropriate geographical areas within which its potential voting strength so calculated is to be measured.

These two interrelated proof requirements present problems difficult enough in the racial vote-dilution cases concerned with legislative districting out of which they originated. In the quite different context of a political group's vote-dilution challenge to a state's design for electing judges, I believe the problems are essentially intractable, that there are no "judicially discernible and manageable standards" for resolving them.

The problem of defining--sufficiently to count its numbers--the group claiming dilution of its voting strength in this case is that it includes, by its own definition, not just Republicans but an indeterminate number of sometime allied non-Republican voters. The reason the group so defines itself is obvious: only so could it identify a significant number of appropriately configured judicial districts in which the group would constitute effective voting majorities. It is true that Bandemer held that racial group vote-dilution

standards could be applied to political group claims notwithstanding the latter group could not be identified as could a racial group by the immutability of its members' defining characteristic. Bandemer, 478 U.S. at 125. But nothing in Bandemer denies the increased difficulty which this element of indeterminacy creates for identifying, in order to number its members, a political group claiming vote dilution. Indeed, the Bandemer Court expressly noted the difficulty but was able to avoid addressing and giving guidance on it by its decision to dismiss the claim on the merits. See id. at 134-35 & n.15. In consequence, because the problem has not been presented in racial vote-dilution cases and has been avoided in the Supreme Court's one political vote-dilution decision, there is presently no authoritative guidance upon it for the base-line federal courts.

The basic difficulty thus unaddressed is of course obvious: how does a court determine the consistently reliable voting strength of a political party's non-party voting allies for particular electoral offices? Obviously there are some voting record data from which inferences may be attempted (claimants here point to judicial district primary election records) but these are fraught with proof problems, (e.g., how many elections? occasional allies or only "true believers"?) see id., and the inferences possible, if allowable at all, are a far cry from the exactitude possible in the racial vote-dilution cases that supply the only available standards.

In this case, the indeterminacy of group identity, hence voting strength, is exacerbated by comparable or even greater indeterminacy with respect to the other, interrelated element in the dilution equation, the geographical areas

within which voting strength is to be measured. Indeed, the geographical area problem in this case, unlike that in legislative districting cases, is judicially unmanageable in the ultimate sense: it cannot be resolved except by making an "initial policy decision"--here one concerning the basic structure of a state's judicial system--that is "not for judicial decision".

To show why requires a brief analysis of the exact vote-dilution claims in issue, and of the way it impacts under vote-dilution jurisprudence on the state's judicial system. The claim here is actually an attack on the state's at-large design for the election (as opposed to primary nomination) of its superior court judges. The remedy sought is the classic one that has evolved in voting rights jurisprudence for successful challenges to at-large and multi-member district electoral designs: require election by districts in some of which the otherwise "submerged" groups constitute effective voting majorities.

Identifying appropriate remedial districts for local or state legislative elections can of course present very difficult judicial problems whose resolution has serious impact on a state's electoral processes and on the immediate racial or political-party makeup of the legislative body. See e.g., Gingles. But in the end, that is the extent of such a remedy's impact: it doesn't affect any fundamental state policy respecting the very structure of its legislative bodies--whether they shall be unicameral or bicameral, the qualification for holding the offices, or the like.

Not so with respect to the impact of the judicial districting remedy sought here. A decision that North Carolina must abandon its historic process of state-wide election of its superior court judges would affect not just that electoral process and the immediate political party mix of these judgeships, but a critical structural feature of the state's judicial system. Central to that structure since 1875 has been the constitutional provision for the "rotation" of superior court judges for sittings over a wider territory than that of their districts of residence. N. C. Const. Art. IV, § 9. This fundamental policy--asserted in the Constitution as a "salutary one that should be continued", id.--is based on a perception that the justice system will be best served by delocalizing these trial courts of general jurisdiction--specifically to minimize the accumulating influence of local connections upon the judges. This is a unique structural feature rarely found in state court systems. Whatever one may think of its merits, it represents a fundamental policy choice respecting the structure of this critical trial-level component of the state's judicial system. Critical to its implementation is the companion choice to let the voters of the entire state rather than just those of a judge's district of residence (the nominating constituency) participate in the election of those judges. While it is of course technically possible to retain the rotation system without state-wide election, the two are so intimately related in concept that it is difficult to believe that the rotation system could be thought any longer justified

if voters in the wider area of rotation were not allowed to participate in the selection of these judges.[1]

Consequently, a complete localizing of this electoral process would be tantamount, as a practical matter, to the rejection of so critical a feature of the rotation system that the policy's abandonment in time would likely be assured. Such a remedy therefore would affect North Carolina's constitutional organization of its judiciary--a "decision of the most fundamental sort for a sovereign entity", Gregory v. Ashcroft, 111 S.Ct. 2395, 2400 (1991) (age-qualification for state judicial offices that might well be invulnerable to the limitations on state power imposed by the Fourteenth Amendment. Id. at 2405. Surely it represents at least an initial policy decision of the sort "not for judicial discretion" that epitomizes the nonjusticiable political question.

There is yet one more problem of "discernible and manageable judicial standards" to be considered in this case that might well alone determine its nonjusticiability. Resolution of the Republican Party's vote-dilution claim here would take place in the context of North Carolina's recent realign-

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[1] Though under the state constitution rotation could be statewide, the state legislature is empowered to provide for less extensive areas of rotation within judicial divisions of its creation. Responding to increased dockets and other factors affecting the logistics of rotation, the legislature over time has increased the divisions from two to the present four, thereby cutting back the rotation areas from roughly half the state to a fourth. This of course simply further complicates the problem of identifying the appropriate geographical areas for measuring group voting strength in this case. As claimants here point out, the state might have an argument at least for division-wide elections if not for state-wide.

ment of judicial districts in response to a Voting Rights Act suit--to create a number of "safe" black voter majority districts for purposes of primary nomination. As Justice O'Connor pointed out in her Bandemer concurrence, one inevitable consequence of opening the door to vote-dilution claims by political parties in addition to those by racial groups would be an "increase in the number of competing claims to equal representation [that] will make judicial review . . . vastly more complex." Bandemer, 478 U.S. at 156. That added complexity is absolutely guaranteeable in this case were it to be allowed to proceed further. Indeed it is difficult to imagine how a court would approach the problem of accommodating the inevitable claims of black voters at least to retain the "safe" nomination districts recently created in response to their Voting Rights Act suit, with the competing claims of the Republican Party for "safe" districts for final election purposes in this case. The effort is sufficiently mind-boggling to demonstrate on that account alone the absence of judicially manageable standards for the task.

II

Even if political party claims of vote dilution respecting judicial elections were justiciable, the claim here should have been dismissed for substantive insufficiency. The panel decision erred in finding the claim as stated a cognizable one under the substantive test laid down in Bandemer. That test, avowedly a more stringent one than that applied in other equal protection contexts, see Bandemer, 478 U.S. at 134 n.14, would find unconstitutional discrimination through partisan political gerrymandering only when an "electoral system is arranged in a manner that will

consistently degrade a voter's or a group of voters' influence on the political process as a whole." Id. at 132 (emphasis added). By this test, the court expressly sought to confine judicial intrusions into this "most political of legislative functions", id. at 143, to only those cases in which a challenged districting plan is alleged to have had, or immediately to threaten, effects "sufficiently serious to require intervention by the federal courts." Id. at 134.

Bandemer's rejection of the claim in that case, and the Court's discussion of the test it applied, make plain the only situation it would think "serious" enough to "require" such judicial intervention. It would exist only where a partisan political gerrymandering process had worked, or assuredly soon would work, an effective destruction of the power of the affected minority political party even to "influence" the political processes of the state to the point of insuring responsiveness to its interests on the part of majority party legislators. See id. at 131-32. Because only in that dire situation could it be assumed that the minority political group had effectively lost its power any longer to protect itself through the voting franchise, only that situation is serious enough to warrant judicial intervention to insure equal protection with respect to laws affecting exercise of that franchise. Critical to the existence of such a drastic situation is that the degradation of the minority political group's influence on the political process must extend to that "process as a whole." See id. at 132, 143.

As the panel decision implicitly recognizes, dramatic successes in state-wide elections by the North Carolina Republican Party (and its cross-over allies) in recent years

would make meeting this requirement impossible if "as a whole" refers to the whole range of the state's political processes. See slip op. pp.22-23 (noting that Republican candidates had won election as Governor in three of the last five elections, as United States Senator in four of the last seven, presently hold four of the state's eleven seats in the United States House of Representatives, and have had other successes in state-wide elections).

The panel avoids the consequence of such a literal reading by dismissing it in a footnote aside. Id. at 20, n.24. Citing no decisional authority in support, the panel holds that "as a whole" in the Bandemer formulation refers narrowly only to the "whole" of an electoral process under specific challenge, here that for electing the state's superior court judges. Id.

That reading, with all respect, is wholly at odds with Bandemer's description of the degree of degradation of a political party's voting power from partisan political gerrymandering that is serious enough to warrant federal judicial intervention. So far as I know, it stands alone among the decisions that have considered the matter. Indeed, the Supreme Court recently and in rapid order has summarily affirmed three three-judge court decisions expressly rejecting this narrow reading of the critical phrase, "as a whole". Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court), aff'd mem. ____ U.S. ____, 113 S.Ct. 30 (Oct. 5, 1992); Fund for Accurate and Informed Representation, Inc. v. Weprin, 796 F. Supp. 662, 668-69 (N.D.N.Y. 1992) (three-judge court), aff'd mem. ____ U.S. ____, 113 S.Ct. 650 (Dec. 7, 1992); Badham v. Eu, 694 F. Supp. 664, 670-

71(N.D.Cal. 1988) (three-judge court), aff'd mem. 488 U.S. 1024 (1989); see also Holloway v. Hechler, ___ F. Supp. __, Civ. No. 2:92-0081 (S.D.W.Va. September 29, 1992) (three-judge court), aff'd mem., _____ U.S. _____, 61 U.S.L.W. 3596, No. 92-1194 (March 1, 1993).

I do not believe that Bandemer contemplated federal court intervention in behalf of a political party as demonstrably capable of fending for itself in a state's political processes as is the contemporary Republican Party in North Carolina. That it may have been unable--even if by intentional thwarting of its efforts--to elect candidates for judgeship on one trial court in the state's judicial system is not the type of egregious effect on its general power to influence the overall political processes of the state that Bandemer required.

III

In summary.

The only claims of group vote-dilution by districting that present justiciable controversies rather than nonjusticiable political questions are claims by racial groups, or by political parties respecting legislative elections. Claims by political parties of vote-dilution respecting judicial elections are not justiciable. This is the import of the holdings in Wells and Bandemer. The claim in this case should have been dismissed--as it was by the district court--on that basis.

Even if vote-dilution claims respecting judicial elections may, like those respecting legislative elections, be

sometimes justiciable under Bandemer's rationale, the articular claim in this case is not. Due to the particular nature of the claim and of the challenged electoral process, there are no "judicially manageable standards" to determine with sufficient precision either the identity of the political group seeking relief or the appropriate geographical areas (judicial districts) within which to measure its group voting strength. Furthermore, resolving the claim against the state would require a federal court to make an initial policy decision respecting the state's organization of its judicial system that is not for the judiciary. Finally, the complexities resulting from the need in adjudicating this political group's dilution claim to accommodate the necessarily conflicting voting rights of black voters respecting the offices in question would in themselves defy the application of judicially manageable standards.

Even if such claims may in particular circumstances be justiciable and if in this circumstance the claim was justiciable, it should have been dismissed for failure to state a claim under Bandemer's substantive test. It did not allege--could not allege--a sufficient degradation of the Republican Party's "influence on the political process as a whole" to warrant federal court intervention to insure fairer representation of Republicans in the office of state superior court judge.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV

Sec. 2. General Court of Justice.

The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

Sec. 9. Superior Courts.

(1) *Superior Court districts.* The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. The General Assembly may provide by general law for the selection or appointment of special or emergency Superior Court Judges not selected for a particular judicial district.

(2) *Open at all times; sessions for trial of cases.* The Superior Courts shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury. Regular trial sessions of the Superior Court shall be held at times fixed pursuant to a calendar of courts promulgated by the Supreme Court. At least two sessions for the trial of jury cases shall be held annually in each county.

(3) *Clerks.* A Clerk of the Superior Court for each county shall be elected for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. If the office of Clerk of the Superior Court becomes vacant otherwise than by the

expiration of the term, or if the people fail to elect, the senior regular resident Judge of the Superior Court serving the county shall appoint to fill the vacancy until an election can be regularly held.

Sec. 10. District Courts.

The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint for a term of two years, from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

Sec. 11. Assignment of Judges.

The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty. The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions. Subject to the general supervision of the Chief Justice of the Supreme Court, assignment of District Judges within each local court district shall be made by the Chief District Judge.

Sec. 12. Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(2) *Court of Appeals.* The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

(3) *Superior Court.* Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) *District Courts; Magistrates.* The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

(5) *Waiver.* The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

(6) *Appeals.* The General Assembly shall by general law provide a proper system of appeals. Appeals from Magistrates shall be heard de novo, with the right of trial by jury as defined in this Constitution and the laws of this State.

Sec. 16. Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.

Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of

RELEVANT PORTIONS OF THE CONSTITUTION OF NORTH CAROLINA, ARTICLE IV CONTINUED . . .

the State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

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